CAPITAL AND INCOME.

Tenant Rights.

A

CONCISE TREATISE

ON

THE LAW OF

CAPITAL AND INCOME

AS BETWEEN

LIFE-TENANT AND REMAINDERMAN.

BY

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PREFACE.

THE principles regulating the enjoyment of settled property by life-tenant and remainderman mainly depend on rules of administration laid down by Courts of Equity, which apply unless excluded by the expression of a contrary intention in the settlement.

The Author's aim has been to collect the reported cases by which these rules have been established, and the cases in which they have been held to be excluded, together with the statutes bearing on the subject: thus presenting in a concise form, the rights of life-tenant and remainderman in respect of profits and proceeds of settled property, and their liabilities in respect of outgoings, outlay, and losses.

It has not been found necessary to distinguish between property settled by deed and property settled by will, except in the case of residuary personal estate, in respect of which distinctions exist as to the right of the life-tenant to enjoyment in specie, which are considered in a separate chapter.

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Wasting property.

WHERE specific property is settled, either by deed or will, without any trust for conversion, the life-tenant is entitled to the income actually produced during his life-tenancy, whether the property be permanent, as in the case of real estate, or of a wasting nature, such as leaseholds (*Perrins* v. *Bellamy*, (1899) 1 Ch. 797; see *Gibson* v. *Bott*, 7 Ves. at p. 96; *Howe* v. *Dartmouth*, 7 Ves. at p. 147; *Pickering* v. *Pickering*, 4 My. & Cr. at p. 299), or terminable annuities: *Walker* v. *Tillott*, 4 L. J. Ch. 232; *Cockran* v. *Cockran*, 14 Sim. 248; and notwithstanding a power for the trustees to vary securities: *Lord* v. *Godfrey*, 4 Madd. 455.

Leaseholds and chattels bound by a covenant to settle after-acquired property stand on the same footing as property specifically settled: *Milford* v. *Peile*, 17 Beav. 602; *Hope* v. *Hope*, 1 Jur. N. S. 770.

It is apprehended that the observations in the judgments in *Prendergast* v. *Prendergast*, 3 H. L. C. at pp. 218, 219, and *Hollier* v. *Burne*, 16 Eq. at p. 167, as to the life-tenant of a perishable or terminable estate settled by will not being entitled to enjoy it in specie without an express direction for that purpose, refer to property forming part of residue: see *post*, Ch. X.

Renewable leaseholds.

Where renewable leaseholds are settled and renewal becomes impossible, if there is merely a discretionary

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power to renew, the life-tenant is entitled to enjoy them in specie: *Tardiff* v. *Robinson*, 27 Beav. 629 n.; *Hayward* v. *Pile*, 5 Ch. 214.

So where the renewal of specifically bequeathed leaseholds had become impossible by the testator's own act, the life-tenant was held entitled to enjoy them in specie, notwithstanding a trust to renew out of residue, which was settled in the same way: *Pinfold* v. *Shillingford*, 46 L. J. Ch. 491.

But where there is an overriding trust for renewal out of income and renewal becomes impossible, the life-tenant is not entitled to enjoy the leaseholds in specie, but only the income of the fund produced by their sale: *Maddy* v. *Hale*, 3 Ch. D. 327; see *Hollier* v. *Burne*, 16 Eq. 163.

Trust for sale.

A trust for sale of real estate and settlement of the proceeds entitles the life-tenant to the rents until sale, unless otherwise disposed of: *Casamajor* v. *Strode*, 19 Ves. 390 n.; *Fitzgerald* v. *Jervoise*, 5 Madd. 25; *Re Laing*, 1 Eq. 416; *Re Carter*, 41 W. R. 140; *Hope* v. *D'Hedouville*, (1893) 2 Ch. 361; *Re Searle*, (1900) 2 Ch. 829; see *Walker* v. *Shore*, 19 Ves. 387; and in the case of a settlement by will, a direction to invest the intermediate rents with the proceeds of sale does not deprive the life-tenant of the right to such rents for more than a year from the testator's death: *Noel* v. *Henley*, 7 Price, 241; *Vickers* v. *Scott*, 3 M. & K. 500; and see *Vigor* v. *Harwood*, 12 Sim. 172, where such a direction was treated as insufficient to deprive the life-tenant of any part of the rents.

But property of a wasting or fluctuating nature (such as leaseholds or shares in a company), settled by way of trust for sale, stands on a different footing; and where so settled by will, without any provision as to the income until sale, the life-tenant is entitled to so much only of the intermediate income as would be equal to the

dividends of the consols which might have been purchased if the property had been converted at the end of a year from the testator's death; the rest of the income being treated as capital: *Anderson* v. *Read*, 22 W. R. 527: see *Wentworth* v. *Wentworth*, (1900) A. C. at p. 171.

Where, however, the rents until sale are directed to be applied as income, the rights of the parties are the same as if there were no trust for sale: see cases *post*, p. 104; and if the trust for sale is only exercisable with the consent of the life-tenant, he seems entitled to the intermediate income without any such direction: see *Askew* v. *Woodhead*, 14 Ch. D. at p. 34.

Portions fund.

Where a fund is raised out of settled land for discharging portions before they are payable, the life-tenant is entitled to the intermediate income of the fund: *Wellesley* v. *Mornington*, 27 L. J. Ch. 150.

Unauthorized investment.

If the settled property is placed on an unauthorized investment which produces more than 4 per cent. interest, the life-tenant is liable to account for the excess: *Baynard* v. *Woolley*, 20 Beav. 583; *Griffiths* v. *Porter*, 25 Beav. 236.

So, where a settled fund was without authority left in a business which produced large profits, the life-tenant was allowed only 4 per cent. interest on the capital: *Re Hill*, 50 L. J. Ch. 551.

Annual and casual profits.

The life-tenant of a settled estate is entitled to all annual and casual profits which accrue during his life-tenancy, in the absence of any provision to the contrary in the settlement: see *Brigstocke* v. *Brigstocke*, 8 Ch. D. at p. 363.

Thus, he is in general entitled to:—

Fruit.

(1) All annual produce, such as fruit and grass: see *Campbell* v. *Wardlaw*, 8 App. Cas. at p. 645;

Rent.

(2) Rent, whether payable quarterly or at longer

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intervals, and whether at the end of a quarter or in advance: see *Brigstocke* v. *Brigstocke*, 8 Ch. D. at p. 363; but as to rent of mines, see *post*, pp. 27—29.

Fines.

(3) Fines and heriots payable by tenants on the renewal of their leases, either under a power (*Milles* v. *Milles*, 6 Ves. 761), or under the settlor's covenant: *Brigstocke* v. *Brigstocke*, 8 Ch. D. 357; and see *Simpson* v. *Bathurst*, 5 Ch. 193; but not fines taken without authority: see *Brigstocke* v. *Brigstocke*, 8 Ch. D. 357; nor fines received on the grant of leases under the powers of the Settled Land Act, 1882, as such fines are to be deemed capital money: see 47 & 48 Vict. c. 18, s. 4.

Interest.

(4) Interest stipulated for by the life-tenant on a sale of part of the estate under the powers of the Lands Clauses Act, 1845, though exceeding 4 per cent.: *Re Hungerford*, 1 Jur. N. S. 845.

Damages.

(5) Damages recovered from tenants for breach of covenant: *Noble* v. *Cass*, 2 Sim. 343.

Compensation.

(6) Compensation received for waiver of restrictive conditions, if imposed on grants by the trustees of the settlement, though not if imposed on grants by the settlor: *Cowley* v. *Wellesley*, 1 Eq. 656.

Insurance money.

But money received under a policy of fire insurance is capital: see *Norris* v. *Harrison*, 2 Madd. 268; and see 14 Geo. III. c. 78, s. 83.

Copyhold fines.

The life-tenant of a manor is entitled to:—

(1) Fines received from copyhold tenants on admittance: see *Brigstocke* v. *Brigstocke*, 8 Ch. D. at p. 363;

(2) Fines received on copyhold grants for lives: *Re Medows*, (1898) 1 Ch. 300;

(3) Fines received on grants of waste land: *Cowley* v. *Wellesley*, 1 Eq. 656;

(4) Preliminary fines received on compulsory enfranchisement under the Copyhold Acts: see *Cowley* v. *Wellesley*, 1 Eq. 656; but see *Re Wilson*, 2 J. & H. 619.

Advowson.

The life-tenant of an advowson has the right of presentation on any vacancy occurring in his lifetime; and where the settlement is by way of trust for sale, the life-tenant of the proceeds has the same rights: *Briggs* v. *Sharp*, 20 Eq. 317; see *Sherrard* v. *Harborough*, Amb. 166.

Chattels.

Where furniture or other chattels are settled, the life-tenant is in general only entitled to their use: *Clarges* v. *Albemarle*, 2 Vern. 245; *Re Hall*, 1 Jur. N. S. 974; see *Randall* v. *Russell*, 3 Mer. at p. 195.

Consumables.

But a specific gift of consumable articles, such as corn or wine, to one for life, in general carries the absolute interest, and any limitation over to the remainderman is void: *Randall* v. *Russell*, 3 Mer. at p. 194; *Andrew* v. *Andrew*, 1 Coll. 690; *Clive* v. *Clive*, 2 Eq. Rep. 913; *Phillips* v. *Beal*, 32 Beav. 25; see *Cockayne* v. *Harrison*, 13 Eq. at p. 434; and see *Re Colyer*, 55 L. T. 344.

Stock-in-trade.

In the case, however, of farming stock or other consumable stock-in-trade, the life-tenant is only entitled to the profits made by its use, and is bound to keep up the stock: substituted articles becoming subject to the settlement: and if it is all sold off on the business being discontinued, he takes only a life interest in the proceeds: *Groves* v. *Wright*, 2 K. & J. 347; *Cockayne* v. *Harrison*, 13 Eq. 432; see *England* v. *Downs*, 6 Beav. 269; unless a contrary intention is shown, as, by a provision that the life-tenant is not to be liable for any diminution or depreciation in the stock: *Breton* v. *Mockett*, 9 Ch. D. 95; and see *Bryant* v. *Easterson*, 7 W. R. 298.

Deer in a park and pigeons in a dovecote stand on the same footing as farming stock: *Maynard* v. *Gibson*, W. N. 1876, 204.

Stock and shares: current profits.

Where stock or shares of a public company are settled, the decision of the company, in accordance with its regulations, either to divide its current profits as

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income, or to capitalize them, is binding as between life-tenant and remainderman, in the absence of any special provision in the settlement: *Re Barton*, 5 Eq. 238.

Dividends.

The life-tenant is accordingly entitled to all dividends declared out of current profits, although exceeding 4 per cent. per annum: *Price* v. *Anderson*, 15 Sim. 473; and (*semble*) a dividend is presumed to be provided out of current profits in the absence of evidence to the contrary: see *Barclay* v. *Wainewright*, 14 Ves. 66.

Bonus out of current profits.

The life-tenant is also entitled to any bonus declared out of current profits: *Preston* v. *Melville*, 16 Sim. 163; *Johnson* v. *Johnson*, 15 Jur. 714; *Hebert* v. *Bateman*, 1 W. R. 191; *Murray* v. *Glasse*, 23 L. J. Ch. 126; *Plumbe* v. *Neild*, 8 W. R. 337; and the presumption seems to be that a bonus is provided out of current profits where the contrary is not shown: *Dale* v. *Hayes*, 40 L. J. Ch. 244; *Maclaren* v. *Stainton*, 3 D. F. & J. 202; *Edmondson* v. *Crosthwaite*, 34 Beav. 30.

But if the company resolves to capitalize its current profits, issuing new shares rateably to its members to represent the same, any shares so issued in respect of settled shares become part of the capital fund under the settlement: *Re Barton*, 5 Eq. 238.

As to what amounts to capitalization of profits, see *post*, p. 7.

A provision in a settlement for capitalizing bonuses has been held not to include bonuses declared out of current profits: *Hollis* v. *Allan*, 14 W. R. 980.

Bonus out of accumulated profits.

The rights of life-tenant and remainderman of settled shares in a public company, in respect of bonuses declared out of accumulated profits, depend to some extent on the power of the company to capitalize its profits.

Where no power to increase capital: Floating capital.

Where the company has no power to increase its capital, but has accumulated profits and used them for capital purposes, so that they have in fact become part of its floating capital, any bonus declared out of such

profits is capital, although the profits may have arisen during the life-tenancy: *Brander* v. *Brander*, 4 Ves. 800; *Paris* v. *Paris*, 10 Ves. 185; *Clayton* v. *Gresham*, 10 Ves. 288; *Witts* v. *Steere*, 13 Ves. 363 (all cases of Bank stock): see *Irving* v. *Houstoun*, 4 Paton Sc. App. 521; and see *Bouch* v. *Sproule*, 12 App. Cas. at pp. 393, 397; unless a contrary intention is shown by the settlement: *Re Mittam*, 4 Jur. N. S. 1077.

And if such a company is empowered by statute to increase its capital, and resolves to divide the additional stock among the proprietors, all new stock allotted in respect of settled stock is capital: *Hooper* v. *Rossiter*, 13 Price, 774.

Where power to increase capital.

Where the company has power either to distribute its profits as dividends or to convert them into capital, the decision of the company, in accordance with its regulations, is binding on everybody interested under the settlement: *Bouch* v. *Sproule*, 12 App. Cas. 385.

Special dividend.

Accordingly, if a company of this kind resolves to divide its accumulated profits as dividends, any dividend so allotted in respect of settled shares belongs to the life-tenant as income, whether described as 'extraordinary dividend' or 'special dividend' (*Re Hopkins*, 18 Eq. 696), 'bonus dividend' (*Re Northage*, 60 L. J. Ch. 488), or 'special bonus': *Re Alsbury*, 45 Ch. D. 237.

New shares.

But if such a company resolves to appropriate accumulated profits to increase its capital, and issues new shares rateably to its members to represent the same, any shares so issued in respect of settled shares, become part of the capital fund under the settlement: *Bouch* v. *Sproule*, 12 App. Cas. 385; *Baring* v. *Ashburton*, 16 W. R. 452.

Capitalization of profits.

The question whether a company, having power to capitalize its profits, has actually done so, is a question of fact in each case: see *Re Malam*, (1894) 3 Ch. at p. 585.

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Resolution to capitalize.

But it seems that in general an actual resolution to increase capital and to apply accumulated profits for that purpose, is required: see *Bouch* v. *Sproule*, 12 App. Cas. at p. 398.

Carrying to reserve.

Thus, merely carrying profits to a reserve fund, does not capitalize them: *Bouch* v. *Sproule*, 12 App. Cas. 385; *Re Alsbury*, 45 Ch. D. 237.

Bonus declared separately.

The declaration of a bonus separately from a dividend, with a notice that it would not be receivable under powers of attorney for receiving dividends, was treated as capitalizing it in *Ward* v. *Combe*, 7 Sim. 634; but this decision seems open to question: see *Bouch* v. *Sproule*, 12 App. Cas. at p. 396.

Option of dividend or shares.

Where the company gives the shareholders the option of taking the profits either as dividends or in the form of new shares, the intention of the company is to be collected from both the substance and form of the scheme adopted. Thus, if the option is given in such a form that the new shares offered would be worth much more than the cash dividend, it raises a presumption that the company intended to appropriate the profits as capital: see *Bouch* v. *Sproule*, 12 App. Cas. at p. 398; but this presumption may be rebutted by the rest of the scheme: *Re Malam*, (1894) 3 Ch. 578.

The exercise of the option by the trustees of the settlement does not affect the rights of the life-tenant and remainderman.

Thus, where the company's intention is not to capitalize, and the trustees accept the new shares, the life-tenant is entitled only to the amount of the dividend appropriated in taking up the shares: *Re Northage*, 60 L. J. Ch. 488; *Re Tindal*, 9 Times L. R. 24; *Re Malam*, (1894) 3 Ch. 578.

New shares.

New shares allotted in respect of settled shares subject to their being paid for are capital: *Rowley* v. *Unwin*, 2 K. & J. 138.

Bonus in lieu of preferential rights.

A bonus declared by a company as compensation for the release of preferential rights attached to settled shares is capital: *Bates* v. *Mackinley*, 31 Beav. 280.

Surplus assets.

Surplus assets of a company which become divisible on dissolution, are treated as capital, as the company's power of declaring a dividend cannot be exercised after the commencement of the winding up: *Re Armitage*, (1893) 3 Ch. 337; see *Nicholson* v. *Nicholson*, 30 L. J. Ch. 617.

Partnership profits.

Where a share in a partnership is settled, the rights of the life-tenant and remainderman are regulated by the practice of the Firm, in the absence of any provision in the settlement to the contrary: *Straker* v. *Wilson*, 6 Ch. 503; so that where the practice has been to divide the whole of the profits, the life-tenant will take them as income: *Gow* v. *Forster*, 26 Ch. D. 672; see *Ibbotson* v. *Elam*, 1 Eq. 188.

But any increase in the value of the capital belongs to the remainderman: *Mousley* v. *Carr*, 4 Beav. 49.

Business.

Where a business is settled, it is conceived that the life-tenant is entitled to the whole profits, unless a contrary intention is shown: and see *Dixon* v. *Dutfield*, 5 L. T. 741 (where the whole profits were expressly given to the life-tenant).

But any increase in the value of the stock-in-trade belongs to the remainderman: *Whiting* v. *Whiting*, 5 Jur. 1127.

Where the annual profits of a business were directed to be held upon the same trusts as were declared of certain proceeds of sale, the interest of which was directed to be paid to one for life, the life-tenant was held entitled only to interest on such profits: *Gee* v. *Liddell*, 35 Beav. 631.

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Policy bonus.

Where a policy of life assurance is settled, bonuses declared by the Office are capital: *Macdonald* v. *Irvine*, 8 Ch. D. 101; but see *Browne* v. *Browne*, 2 Gif. 304 (where the policy was voluntarily taken out by the life-tenant).

Mortgage bonus.

Where settled funds are invested on mortgage, the usual six months' interest paid on redemption in lieu of notice, seems to be income; but a bonus paid by the mortgagor for waiver of a stipulation not to pay off for a fixed period, is capital: *Re Searancke*, 74 L. T. 339.

Accumulation.

The life-tenant's right to income may be defeated by a trust for accumulation, as in *Re Alford*, 32 Ch. D. 383; or modified by a direction to form a sinking fund out of income for the protection of the settled property, or the discharge of an incumbrance, in which case the fund so created becomes capital, but in the absence of a provision to the contrary, the life-tenant is entitled to the income produced thereby: *Varlo* v. *Faden*, 1 D. F. & J. 211; *Re Sudbury & Poynton*, (1893) 3 Ch. 74.

Where a testator gave a fund to trustees to invest in land to be settled, and directed the intermediate income to accumulate, the life-tenant was held entitled to the interest produced by the fund from the end of a year after the trustees had received it, although no land had been purchased: *Parry* v. *Warrington*, 6 Madd. 155.

Accumulations of income made during the minority of a life-tenant who has a vested interest, belong to him, notwithstanding section 43 of the Conveyancing Act, 1881: *Re Humphreys*, (1893) 3 Ch. 1; *Re Wells*, 43 Ch. D. 281; unless a contrary intention is shown by the settlement: see *Crosse* v. *Glennie*, 2 Y. & C. C. C. 237; *Greene* v. *Potter*, 2 Y. & C. C. C. 517.

Failure of accumulation.

If the direction for accumulation is void, or the purpose for which it is directed fails, the life-tenant is remitted to his ordinary rights.

Thus, where trustees under a void trust to accumulate, invested accumulations of income in land, the life-tenant was held entitled to have the land conveyed to him: *Browne* v. *Stoughton*, 14 Sim. 369; see *Marshall* v. *Holloway*, 2 Sw. 432; *Combe* v. *Hughes*, 12 L. T. 438.

So, where the trustees of a settled estate were directed to apply the rents in paying the settlor's debts, until the whole should be discharged, and before this was done the debts were raised by sale under order of the Court, the life-tenant was held entitled to the unused accumulations as well as the subsequent rents: *Tewart* v. *Lawson*, 18 Eq. 490; see *Re Richardson*, (1900) 2 Ch. 778.

Surplus accumulations.

And where the trustees were directed to accumulate the rents until the accumulations should be sufficient to discharge the mortgages affecting the estate and then to pay them off, and before this was done the mortgagees realized their security, it was held that the unused accumulations, as well as the subsequent rents, belonged to the life-tenant: *Norton* v. *Johnstone*, 30 Ch. D. 649.

Renewal fund.

A fund reserved by trustees out of the rents of settled leaseholds, under a trust for renewal upon reasonable terms out of the rents or by mortgage, was held to belong to the life-tenant upon renewal becoming impossible: *Morres* v. *Hodges*, 27 Beav. 625; but if there is an overriding trust for renewal out of income, the fund must be treated as capital: *Maddy* v. *Hale*, 3 Ch. D. 327.

Apportionment.

Before the Apportionment Acts, rent and other periodical payments were not apportionable as between life-tenant and remainderman in respect of time, unless expressly made so by the settlement, although interest on money lent and other payments accruing from day to day were apportionable (see *Lewin* on Apportionment, p. 89); including interest on railway debentures (*Re Rogers*, 1 Dr. & Sm. 338), and interest on a share of capital in a partnership: *Ibbotson* v. *Elam*, 1 Eq. 188.

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Apportionment Act, 1834.

This defect was to some extent remedied by the Act 4 & 5 Will. IV. c. 22, whereby rents, annuities, pensions, dividends, moduses, compositions, and other payments, made payable or coming due at fixed periods, under any instrument executed, or (being a will or testamentary instrument) coming into operation, after the 16th of June, 1834, are rendered apportionable on the death of a life-tenant, according to the time which has elapsed from the commencement or last period of payment (as the case may be), except in cases in which it is expressly stipulated that no apportionment shall take place (ss. 2, 3).

This Act is still in force, but has been superseded by the wider provisions of the Apportionment Act, 1870. For the decisions on the earlier Act, see *Lewin* on Apportionment, Part II.

Apportionment Act, 1870.

The Apportionment Act, 1870 (33 & 34 Vict. c. 35), provides that all 'rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly' (s. 2); except in cases in which it is expressly stipulated that no apportionment shall take place (s. 7).

The apportioned part of a continuing rent, annuity, or other periodical payment, is payable or recoverable when the 'entire portion' becomes due and payable, and not before; and the apportioned part of a rent, annuity, or other periodical payment, determined by death or otherwise, is payable or recoverable when the next 'entire portion' would have been payable if it had not determined, and not before (s. 3).

The life-tenant's personal representatives have the same remedies at law and in equity for recovering such apportioned parts when payable (allowing proportionate

parts of all just allowances) as they would have had for recovering the 'entire portions' if entitled thereto: except that in the case of an entire or continuing rent, they must resort not to the tenants or persons liable to pay the 'entire portion,' but to the remainderman or other person entitled to recover and receive it (s. 4): see *Bulkeley* v. *Stephens*, (1896) 2 Ch. at p. 249.

'Rents.' In the construction of the Act, 'Rents' include rent service, rentcharge, and rent seck, and also tithes, and all periodical payments or renderings in lieu of or in the nature of rent or tithe; 'Annuities.' 'Annuities' include salaries and pensions; 'Dividends.' and 'Dividends' include all payments made by the name of dividend, bonus or otherwise, out of the revenue of trading or other public companies, divisible between the members, whether usually made or declared at any fixed times or otherwise; such divisible revenue being deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment is declared or expressed to be made; but 'dividend' does not include payments in the nature of a return or reimbursement of capital (s. 5): see *Re Griffith*, 12 Ch. D. 655.

Effect of Act. The Act applies whether the settlement came into operation before or after the passing of the Act: *Lawrence* v. *Lawrence*, 26 Ch. D. 795; *Patching* v. *Barnett*, 43 L. T. 50; and (if not excluded by the settlement) makes current rents, dividends, or other periodical income accruing at the life-tenant's death, apportionable as between his personal representatives and the next life-tenant or remainderman; *Re Cline*, 18 Eq. 213; *Pollock* v. *Pollock*, 18 Eq. 329; *Lawrence* v. *Lawrence*, 26 Ch. D. 795.

But the Act does not apply to income accruing at the date of the settlement, and expressly included therein; so that where shares are settled with the accruing dividend, without any provision for capitalizing it, the whole

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of such dividend belongs to the life-tenant: *Re Lysaght*, (1898) 1 Ch. 115.

A mere inference collected from the general terms of the settlement is not sufficient to exclude the Act: in order to have that effect, the terms of the gift must be so clear as necessarily to exclude apportionment: see *Tyrrell* v. *Clark*, 2 Dr. 86.

Dividends of public companies.

The Act applies to dividends of any public company: *Re Griffith*, 12 Ch. D. 655; including any company registered under the Companies Act, 1862: *Re Lysaght*, (1898) 1 Ch. 115.

A quinquennial bonus or division of profits on shares in a life assurance company is therefore apportionable: *Re Griffith*, 12 Ch. D. 655.

Partnership profits.

Profits of a private business or partnership are not apportionable under the Act (*Jones* v. *Ogle*, 8 Ch. 192), but must be taken as having accrued at the end of the period for which they are declared: *Browne* v. *Collins*, 12 Eq. 586; *Lambert* v. *Lambert*, 22 W. R. 359; and if the life-tenant dies before the expiration of that period, they belong to the next life-tenant or remainderman: *Re Cox*, 9 Ch. D. 159. Delay in ascertaining the profits does not affect the rights of the parties interested: *Browne* v. *Collins*, 12 Eq. 586; but see *Straker* v. *Wilson*, 6 Ch. 503.

Arrears of income.

The Act does not apply to income accrued due at the life-tenant's death; so that rent payable in advance is not apportionable: see *Ellis* v. *Rowbotham*, (1900) 1 Q. B. 740.

So dividends declared before the life-tenant's death, although not payable till afterwards, are not apportionable, but belong to his estate, in the absence of any provision to the contrary: *Wright* v. *Tuckett*, 1 J. & H. 266; and it is conceived that dividends declared after his death, in respect of a period expiring in his lifetime, stand on the same footing.

A provision entitling the remainderman to dividends in arrear at the life-tenant's death, was held not to apply to extraordinary arrears occasioned by a Revolution: *Hachett* v. *Pattle*, 6 Madd. 4.

As to apportionment between the life-tenant under a specific devise or bequest and the residuary legatee, (1) in respect of rents and dividends accruing at the testator's death. see *Capron* v. *Capron*, 17 Eq. 288; *Pollock* v. *Pollock*, 18 Eq. 329; *Constable* v. *Constable*, 11 Ch. D. 681; and (where the Act is excluded), *Bates* v. *Mackinley*, 31 Beav. 280 (a case before the Act); and (2) in respect of dividends accrued before the death but not payable till afterwards, see *Lock* v. *Venables*, 27 Beav. 598; *De Gendre* v. *Kent*, 4 Eq. 283.

And as to exclusion of apportionment by express stipulation, see *Clive* v. *Clive*, Kay, 600; *Unwin* v. *Eykin*, W. N. 1866, 268; *Jones* v. *Ogle*, 8 Ch. at p. 196; *Re Lysaght*, (1898) 1 Ch. 115; *Re Meredith*, 67 L. J. Ch. 409.

Change of investment.

The Apportionment Act does not apply to a change of investment, so that the income accruing on the new investment at the date of purchase is not apportionable.

Thus, where a fund was settled by will with interest to be paid to the life-tenant until investment, she was held entitled to the whole of the accruing dividends of the stocks purchased, in addition to the intermediate interest of the fund: *Re Clarke*, 18 Ch. D. 160; and see *post*, p. 35.

But where the sanction of the Court is required to a change of investment, it seems that the order should in general contain a provision to prevent the life-tenant receiving income twice over; see *Re Ingram*, 11 W. R. 980.

CHAPTER II.

TIMBER AND MINERALS.

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Timber.

TIMBER growing on settled land forms part of the inheritance, which a life-tenant cannot in general take without express words in the settlement: *Plymouth* v. *Archer*, 1 Bro. C. C. 159; *Re Llewellin*, 37 Ch. D. 317.

Oak, ash, and elm of twenty years growth and upwards, are timber by the general law, and certain other trees, such as beech and birch, are in some places timber by the custom of the country: see *Honywood* v. *Honywood*, 18 Eq. at p. 309; *Re Harrison*, 28 Ch. D. at p. 227; *Dashwood* v. *Magniac*, (1891) 3 Ch. 306; *Pardoe* v. *Pardoe*, 82 L. T. 547.

Impeachment of waste.

In practice, the life-tenant's rights depend to a great extent on his liability for waste, the rule being that he is impeachable for waste unless the contrary is provided by the settlement: see *Lowndes* v. *Norton*, 33 L. J. Ch. 583; *Re Ridge*, 31 Ch. D. 504; *Pardoe* v. *Pardoe*, 82 L. T. 547.

Life-tenant impeachable.

A life-tenant impeachable for waste may not in general cut or take the proceeds of timber, whether his estate be legal or equitable: *Whitfield* v. *Bewit*, 2 P. Wms. 240; *Lee* v. *Alston*, 1 Bro. C. C. 194; *Gower* v. *Eyre*, Coop. G. 156; *Denton* v. *Denton*, 7 Beav. 388; *Honywood* v. *Honywood*, 18 Eq. 306; *Pardoe* v. *Pardoe*, 82 L. T. 547; although the timber be decaying: *Perrot* v. *Perrot*, 3 Atk. 94.

Exceptions:—

Timber estate.

(1) He is entitled to the proceeds of timber cut

periodically in the regular course of management, established by local custom or long usage on the estate: *Cowley* v. *Wellesley*, 1 Eq. 656; *Honywood* v. *Honywood*, 18 Eq. 306; although only life-tenant of a term: *Dashwood* v. *Magniac*, (1891) 3 Ch. 306; see *Bagot* v. *Bagot*, 32 Beav. at p. 517.

Thinnings.

(2) He is entitled to the proceeds of timber trees under twenty years of age, cut in due course of cultivation for the purpose of preserving or allowing the growth of the remaining trees: *Honywood* v. *Honywood*, 18 Eq. 306; see *Bagot* v. *Bagot*, 32 Beav. at p. 518; *Dashwood* v. *Magniac*, (1891) 3 Ch. at p. 330; but not to the proceeds of timber felled for this purpose: *Cowley* v. *Wellesley*, 1 Eq. 656.

Timber for improvements.

(3) He may cut down and use any timber or trees not planted or serving for shelter or ornament, for the purpose of effecting any improvement under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114, s. 34).

(4) He may cut down and use timber and other trees not planted or left standing for shelter or ornament, for the purpose of executing, maintaining, and repairing any improvement authorized by the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 29).

Ripe timber: S. L. Act, 1882.

(5) He is entitled to one fourth part of the net proceeds of timber which, being ripe and fit for cutting, is cut and sold under the Settled Land Act, 1882, with the consent of the trustees of the settlement or by order of the Court; while the remaining three fourth parts of such proceeds have to be set aside as capital: 45 & 46 Vict. c. 38, s. 35. But this section does not entitle the life-tenant to any part of the value of growing timber sold with the estate: see *Re Llewellin*, 37 Ch. D. 317.

Other trees.

A life-tenant impeachable for waste is in general entitled to cut and take the proceeds of all trees that are not timber, unless planted for ornament or protection: *Honywood* v. *Honywood*, 18 Eq. 306; see *Dashwood* v. *Magniac*, (1891) 3 Ch. at p. 351.

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Fir trees. Underwood.

Thus, he has been held entitled to thinnings of fir trees under twenty years of age: *Pidgeley* v. *Rawling*, 2 Coll. 275; and underwood of sufficient growth: *Pigot* v. *Bullock*, 1 Ves. Jun. 479; *Butler* v. *Borton*, 5 Madd. 40; *Brydges* v. *Stephens*, 6 Madd. 279; but not stools of underwood: *Honywood* v. *Honywood*, 18 Eq. 306.

Trust for sale.

So, where plantations of trees other than timber are settled by way of trust for sale, and the intermediate rents are applicable as income, he seems entitled to the proceeds of trees cut by the trustees in the regular course of management: see *Re Harrison*, 28 Ch. D. 220.

S. L. Act, 1882, s. 28.

But he may not cut down, except in proper thinning, any trees planted as an improvement under the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 28).

Windfalls.

Timber blown down during the tenancy of a life-tenant impeachable for waste, belongs in general to the owner of the first vested estate of inheritance: *Bewick* v. *Whitfield*, 3 P. Wms. 267; *Honywood* v. *Honywood*, 18 Eq. 306.

But the life-tenant is entitled to the interest produced by the investment of the proceeds of windfalls: *Bateman* v. *Hotchkin*, 31 Beav. 486; see *Bagot* v. *Bagot*, 32 Beav. at p. 526; *Re Harrison*, 28 Ch. D. at p. 228; and he is entitled to such parts of the timber blown down as he might have cut; *e.g.*, proper thinnings or coppices cut periodically in the nature of crops: *Bateman* v. *Hotchkin*, 31 Beav. 486.

Extraordinary windfalls.

But where larch plantations were settled by way of trust for sale, the intermediate rents being given as income, and the regular course of management was to thin annually and apply the proceeds as income, it was held that the proceeds of trees blown down by extraordinary gales did not belong to the life-tenant, but must (after deducting the expense of replanting) be invested, such an annual sum being paid to him out of income, and (if necessary) capital, as would be equivalent

to the average income of the plantations: *Re Harrison*, 28 Ch. D. 220.

Unauthorized cutting.

Timber cut by a life-tenant impeachable for waste belongs in general to the owner of the first vested estate of inheritance, unless cut by collusion with him: *Whitfield* v. *Bewit*, 2 P. Wms. 240; *Bagot* v. *Bagot*, 32 Beav. 509; *Honywood* v. *Honywood*, 18 Eq. 306; and so does timber cut by a trespasser: *Bewick* v. *Whitfield*, 3 P. Wms. 267; and the mere fact of the life-tenant being also the owner of the first estate of inheritance, will not make the Court treat him as guilty of collusion: *Birch Wolfe* v. *Birch*, 9 Eq. 683.

Proceeds of unauthorized cutting.

The proceeds of timber cut without authority may in general be claimed at once by the owner of the first vested estate of inheritance: *Castlemaine* v. *Craven*, 2 Eq. Cas. Abr. 758; *Lee* v. *Alston*, 3 Bro. C. C. 38; *Bagot* v. *Bagot*, 32 Beav. 509; *Seagram* v. *Knight*, 2 Ch. at p. 632; see *Ferrand* v. *Wilson*, 4 Ha. at p. 382; notwithstanding the existence of an intervening life-estate without impeachment of waste: see *Pigot* v. *Bullock*, 1 Ves. Jun. 479; *Gent* v. *Harrison*, Joh. at p. 524; *Re Barrington*, 33 Ch. D. at p. 527; and notwithstanding the possibility of his estate being defeated by some intervening estate coming into existence: *Lee* v. *Alston*, 3 Bro. C. C. 38; *Dare* v. *Hopkins*, 2 Cox, 110. The dictum to the contrary in *Bagot* v. *Bagot*, 32 Beav. at p. 523, has been disapproved: see *Re Cavendish*, W. N. 1877, 198.

Income of proceeds.

But if the life-tenant is himself the owner of the next vested estate of inheritance, the Court will not permit him to take advantage of his own wrong, but withholds the proceeds so long as there is a possibility of any intervening estate coming into existence, and requires the income thereof to be accumulated for the benefit of the persons entitled to the inheritance at his death:

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Williams v. *Bolton*, 1 Cox, 72; *Powlett* v. *Bolton*, 3 Ves. 374; see *Bagot* v. *Bagot*, 32 Beav. 509.

Cutting in due course of management.

Where, however, the cutting, though unauthorized, is in due course of management, and is adopted by the Court, the income of the proceeds is allowed to be received by the life-tenant: *Bagot* v. *Bagot*, 32 Beav. 509; *Gent* v. *Harrison*, Joh. at p. 523; *Lowndes* v. *Norton*, 6 Ch. D. 139; and if a subsequent life-tenant without impeachment of waste comes into possession, the proceeds of such of the timber as he might have cut, belong to him: *Gent* v. *Harrison*, Joh. 517; *Lowndes* v. *Norton*, 6 Ch. D. 139.

Cutting under order of Court.

Before the Settled Land Act, 1882, came into operation, the Court would not order timber to be cut, on the application of the life-tenant, merely because it was ripe for cutting, but only where it was shown to be for the benefit of the inheritance, as where it was decaying or injuring the growth of other timber: *Hussey* v. *Hussey*, 5 Madd. 44; *Tooker* v. *Annesley*, 5 Sim. at p. 240; *Tollemache* v. *Tollemache*, 1 Ha. 456; *Seagram* v. *Knight*, 2 Ch. 628; see *Peters* v. *Blake*, 6 L. J. Ch. 157.

Where timber was cut by order of the Court, the usual course was to invest the proceeds and give the life-tenant the income: *Tooker* v. *Annesley*, 5 Sim. 235; *Lygon* v. *Beauchamp*, 6 L. J. Ch. 158; *Bishop* v. *Bishop*, 10 L. J. Ch. 302; *Dickin* v. *Hamer*, 1 Dr. & Sm. 284; *Honywood* v. *Honywood*, 18 Eq. 306 (not following *Bewick* v. *Whitfield*, 3 P. Wms. 267): see *Mildmay* v. *Mildmay*, 4 Bro. C. C. 76; the capital going to the first life-tenant without impeachment of waste: *Phillips* v. *Barlow*, 14 Sim. 263; *Jodrell* v. *Jodrell*, 20 L. T. 349; or (if none) to the owner of the first vested estate of inheritance when the life estate fell in: *Field* v. *Brown*, 27 Beav. 90; *Honywood* v. *Honywood*, 18 Eq. 306.

Trustees' cuttings.

If timber, decaying or injuring the growth of other

timber, is cut by trustees without special power, and their act is adopted by the Court, the proceeds are applicable as if the trees had been cut by order of the Court, the life-tenant taking the income: *Waldo* v. *Waldo*, 7 Sim. 261; and the capital going to the first life-tenant without impeachment of waste: *Waldo* v. *Waldo*, 12 Sim. 107, or (if none) to the owner of the first vested estate of inheritance.

Life-tenant without impeachment.

A life-tenant without impeachment of waste is entitled (subject to the qualifications mentioned below) to cut and take the proceeds of timber: *Partridge* v. *Pawlett*, 1 Atk. 467; see *Williams* v. *Williams*, 15 Ves. at p. 425; including young trees, provided they are fit for the purposes of timber: *Smythe* v. *Smythe*, 2 Sw. 251; see *Piers* v. *Piers*, 1 Ves. Sen. 521; *Potts* v. *Potts*, 3 L. J. O. S. Ch. 176; and ornamental trees, if planted for the purpose of profit: *Halliwell* v. *Phillips*, 4 Jur. N. S. 607.

The life-tenant of a term limited without impeachment of waste seems to stand on the same footing: see *Bridges* v. *Stephens*, 2 Sw. 150 n.

The existence of a prior term of years seems not to affect the rights of the life-tenant if he is in possession: see *Wolf* v. *Hill*, 2 Sw. 149 n. But where the trustees of the term are in possession, it seems he cannot cut timber without leave of the Court: see *Aspinwall* v. *Leigh*, 2 Vern. 218.

Windfalls, &c.

A life-tenant without impeachment of waste is also entitled to windfalls, and to timber wrongfully cut by strangers during his life-tenancy: see *Anon.* Mos. 237; *Re Barrington*, 33 Ch. D. at p. 527; and to the proceeds of timber cut by direction of the Court: *Lovat* v. *Leeds*, 2 Dr. & Sm. 75; and to a charge on the inheritance for the proceeds of timber cut and sold by trustees of an overriding trust for sale for payment of debts: *Davies* v. *Wescomb*, 2 Sim. 425.

Cutting by Court.

Trustees' cuttings.

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As to his rights in respect of timber cut during a previous life-tenancy, see *ante*, pp. 19—21.

The rights of a life-tenant without impeachment of waste are, however, subject to the following qualifications:—

Ornamental timber.

(1) He may not cut timber or other trees planted or left standing by a former owner for ornament or shelter of the mansion-house or park: *Packington's case*, 3 Atk. 215; *O'Brien* v. *O'Brien*, Amb. 107; *Day* v. *Merry*, 16 Ves. 375; *Lansdowne* v. *Lansdowne*, 1 Madd. 116; *Coffin* v. *Coffin*, Jac. 70; *Wombwell* v. *Bellasyse*, 6 Ves. 110 a (ed. 1827); *Newdigate* v. *Newdigate*, 1 Sim. 131; 8 Bli. N. S. 734; *Wellesley* v. *Wellesley*, 6 Sim. 497; *Morris* v. *Morris*, 15 Sim. 505; 16 L. J. Ch. 201; *Ashby* v. *Hincks*, 58 L. T. 557; even though decaying or injuring the growth of other trees: *Lushington* v. *Boldero*, 6 Madd. 149: it being a question of fact in each case, whether the trees were planted or left standing for ornament or shelter: *Downshire* v. *Sandys*, 6 Ves. 107; *Marker* v. *Marker*, 9 Ha. 1; see *Wombwell* v. *Bellasyse*, 6 Ves. 110 a. (ed. 1827); and the intention having not unfrequently to be collected from the conduct of the settlor: see *Lushington* v. *Boldero*, 6 Madd. 149; *Micklethwait* v. *Micklethwait*, 1 De G. & J. 504; *Halliwell* v. *Phillips*, 4 Jur. N. S. 607.

Saplings.

(2) He may not cut saplings to the extent of spoliation: *O'Brien* v. *O'Brien*, Amb. 107; *Lansdowne* v. *Lansdowne*, 1 Madd. 116; see *Potts* v. *Potts*, 3 L. J. O. S. Ch. 176; *Aston* v. *Aston*, 1 Ves. Sen. 264; *Halliwell* v. *Phillips*, 4 Jur. N. S. 607.

Timber sold with estate.

(3) He is not entitled to the proceeds of growing timber sold with the estate under a power of sale: *Doran* v. *Wiltshire*, 3 Sw. 699; *Wolf* v. *Hill*, 2 Sw. 149 n.; see *Waldo* v. *Waldo*, 12 Sim. at p. 112; and see *ante*, p. 17.

Improvements under S. L. Act.

(4) He may not cut down, except in proper thinning, any trees planted as an improvement under the Settled Land Act, 1882: 45 & 46 Vict. c. 38, s. 28.

If the life-tenant cuts ornamental timber wrongfully, the Court will not allow him to gain any benefit from it, but directs the proceeds to be accumulated for the benefit of the succeeding owners of the estate: *Lansdowne* v. *Lansdowne*, 1 Madd. 116; *Wellesley* v. *Wellesley*, 6 Sim. 497; *Lushington* v. *Boldero*, 15 Beav. 1.

Proceeds of wrongful cutting.

In one case, the remainderman in tail was held entitled, notwithstanding the possibility of intervening remainders arising: *Butler* v. *Kynnersley*, 8 L. J. O. S. Ch. 67; but the modern decisions are opposed to this: see *Lushington* v. *Boldero*, 15 Beav. at p. 2; *Honywood* v. *Honywood*, 18 Eq. at p. 311; and see *Rolt* v. *Somerville*, 2 Eq. Cas. Abr. 759.

If, however, the timber cut is such as the Court would have directed to be cut, in order to preserve and improve the remaining ornamental timber (see *Ford* v. *Tynte*, 2 D. J. & S. 127), the life-tenant is entitled to the proceeds: *Baker* v. *Sebright*, 13 Ch. D. 179; see *Bubb* v. *Yelverton*, 10 Eq. 465.

Special provisions.

The life-tenant's rights in respect of timber may be enlarged or restricted by special provisions in the settlement, but so far as such provisions do not extend, his ordinary rights remain.

Express power to cut.

Thus, an express power for the life-tenant to cut timber for repairs, does not affect his right to periodical cuttings of a timber estate: *Dashwood* v. *Magniac*, (1891) 3 Ch. 306.

So, liberty to cut timber and underwood for use but not to sell, was held not to restrict the life-tenant's common law right to underwood: *Pigot* v. *Bullock*, 1 Ves. Jun. 479.

A power to cut timber at seasonable times, was held not to extend to saplings or trees planted or left for ornament: *Chamberlyne* v. *Dummer*, 1 Bro. C. C. 166; 3 Bro. C. C. 549.

A power to cut and sell for his own use, does not

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entitle the life-tenant to the proceeds of growing timber sold with the estate under the powers of the Settled Land Act, 1882: *Re Llewellin*, 37 Ch. D. 317.

Excepted timber.

An express exception of timber in specified park avenues and woods, does not affect the life-tenant's rights as to other timber: see *Newdigate* v. *Newdigate*, 1 Sim. 131; 8 Bli. N. S. 734.

Voluntary waste excepted.

A life-tenant without impeachment of waste, except voluntary waste, may cut in due course of management and take the proceeds of timber not planted or left for ornament or shelter: *Vincent* v. *Spicer*, 22 Beav. 380; see *Micklethwait* v. *Micklethwait*, 1 De G. & J. 504; and is entitled to the income of proceeds of timber cut by order of the Court: *Wickham* v. *Wickham*, 19 Ves. 419.

But if he cuts timber wrongfully in collusion with the ultimate remainderman in fee, and divides the proceeds with him, notwithstanding an intervening limitation in tail to an unborn person who afterwards comes into existence, the latter may recover the proceeds: *Garth* v. *Cotton*, 3 Atk. 751.

Power for trustees to cut.

A special power for trustees to cut, does not enlarge the life-tenant's powers: *Downshire* v. *Sandys*, 6 Ves. 107.

But where an equitable life-tenant without impeachment of waste takes subject to a power for the trustees to cut timber for payment of incumbrances, he cannot cut timber during the continuance of the power: *Briggs* v. *Oxford*, 1 D. M. & G. 363; *Kekewich* v. *Marker*, 3 Mac. & G. 311.

On the other hand, a direction that timber or wood shall be used for repairs or otherwise for the benefit of the estate or sold and applied as personalty, has been held not to affect the life-tenant's right to underwood: *Butler* v. *Borton*, 5 Madd. 40.

Trust for sale.

Where land is devised upon trust for sale and reinvestment in land, to be settled to the use of a person

for life without impeachment of waste, he is not entitled to cut timber on the land devised, even if the rents and profits until sale are given to the persons who would be entitled to the purchased lands: *Plymouth* v. *Archer*, 1 Bro. C. C. 159.

Trust to invest in land.

As to how far a trust to invest personalty in land to be settled to the use of one for life without impeachment of waste is properly executed by the purchase of a timber estate, see *Burges* v. *Lamb*, 16 Ves. 174; and see *Re Jones*, 1 Jur. N. S. 817.

Remainderman's rights.

Although a remainderman has no right to cut timber, yet in one case the Court gave leave to a remainderman in fee to cut timber for the payment of legacies, there being a gift over in default of payment within a limited time: *Claxton* v. *Claxton*, 2 Vern. 152.

Receiver.

Where timber is cut improperly, the remainderman is entitled to have the rents impounded until the inheritance is recouped the amount: *Briggs* v. *Oxford*, 3 W. R. 588.

Set-off.

In taking the account, the life-tenant is not entitled to set off the value of improvements made by him: *Lowndes* v. *Norton*, 33 L. J. Ch. 583; but where the life-tenant was also the owner of the first vested estate of inheritance, and had power to cut timber for repairs, improvements effected by him were allowed to be set off against the proceeds received by his executors: *Birch Wolfe* v. *Birch*, 9 Eq. 683.

Delay.

Where it was found impossible to take the account accurately, the life-tenant was charged arbitrarily: *Leeds* v. *Amherst*, 20 Beav. 239; but where there has been delay in taking proceedings, the Court deals liberally with him: see *Bagot* v. *Bagot*, 32 Beav. 509.

Minerals.

Minerals stand in a similar position to timber, inasmuch as being imbedded in the soil, they form part of the inheritance: see *Campbell* v. *Wardlaw*, 8 App. Cas. at pp. 645, 649.

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Accordingly the rights of a life-tenant in respect of minerals commonly depend on the question whether he is impeachable for waste, just as in the case of timber: see *Re Ridge*, 31 Ch. D. 504; and see *ante*, p. 16.

Life-tenant impeachable.

A life-tenant impeachable for waste may not open mines or clay pits, or get stone from unopened quarries (except for repairs or statutory improvements): *Whitfield* v. *Bewit*, 2 P. Wms. 240; *Viner* v. *Vaughan*, 2 Beav. 466; *Ferrand* v. *Wilson*, 4 Ha. at p. 388; but he may work and take the proceeds of mines open at the date of the settlement, unless a contrary intention is shown: *Clavering* v. *Clavering*, 2 P. Wms. 388; *Plymouth* v. *Archer*, 1 Bro. C. C. 159; *Bagot* v. *Bagot*, 32 Beav. 509; see *Campbell* v. *Wardlaw*, 8 App. Cas. at p. 645; *Dashwood* v. *Magniac*, (1891) 3 Ch. at pp. 327, 360; and may open new pits and shafts to follow the same vein of coal: *Clavering* v. *Clavering*, 2 P. Wms. 388; see *Elias* v. *Snowdon Slate Quarries Co.*, 4 App. Cas. at p. 466; but see *Re Maynard*, (1899) 2 Ch. 347.

Open mines.

A new seam of coal in an old mine is treated as an open mine: *Spencer* v. *Scurr*, 31 Beav. 334; so, the whole of the gravel in the waste lands of a manor is treated as one mine, and each gravel pit as a fresh pit in the mine: see *Cowley* v. *Wellesley*, 1 Eq. at p. 659.

But the fact of stone having been dug from a quarry merely for repairing the mansion-house would seem not to make it an open quarry: see *Elias* v. *Snowdon Slate Quarries Co.*, 4 App. Cas. at p. 465.

Abandoned mines.

On the other hand, mines which have been discontinued for twenty or thirty years in consequence of not being remunerative, may (it seems) be still regarded as open; although mines abandoned by the settlor for a long period for the advantage of the inheritance, would probably be treated as unopened mines: *Bagot* v. *Bagot*, 32 Beav. 509; see *Viner* v. *Vaughan*, 2 Beav. 466; *Greville-Nugent* v. *Mackenzie*, (1900) A. C. 83.

The life-tenant may also get and work freestone, limestone, clay, sand and other substances for the purpose of effecting any improvement under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114, s. 34), or for the purpose of executing, maintaining, or repairing any improvement authorized by the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 29).

Improvement of Land Act, 1864, s. 34.

S. L. Act, 1882, s. 29.

A life-tenant impeachable for waste is in general entitled to the rents and royalties paid by tenants of mines open at the date of the settlement: see *Spencer* v. *Scurr*, 31 Beav. 334; *Re Ridge*, 31 Ch. D. at p. 508; and see *ante*, p. 26.

Royalties of open mines.

His rights are the same where the settlement is by way of trust for sale, and the intermediate rents and profits are directed to go as income: *Miller* v. *Miller*, 13 Eq. 263; *Greville-Nugent* v. *Mackenzie*, (1900) A. C. 83.

Exceptions:—

(1) If the rent is reserved by a lease granted under the powers of the Settled Estates Act, 1877, one fourth part of the rent has to be set aside as capital: 40 & 41 Vict. c. 18, s. 4; see *Re Maynard*, (1899) 2 Ch. 347.

S. E. Act, 1877, s. 4.

(2) If the rent is reserved by a lease granted under the powers of the Settled Land Act, 1882, where the life-tenant is impeachable for waste in respect of minerals, three fourth parts of the rent, and otherwise one fourth part thereof, must be set aside as capital money, and the residue of the rent goes as rents and profits, unless a contrary intention is expressed in the settlement: 45 & 46 Vict. c. 38, s. 11. But it has been held that a life-tenant impeachable for waste, having power to work open mines, is, for the purposes of this section, not impeachable for waste in respect of the minerals got from such mines, and is therefore entitled to three fourths of the rent: *Re Chaytor*, (1900) 2 Ch. 804.

S. L. Act, 1882, s. 11.

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Royalties of mines opened since settlement.

Rents and royalties paid by tenants of mines opened since the date of the settlement do not belong to a life-tenant impeachable for waste, but are treated as capital, unless a contrary intention is shown in the settlement: see *Dickin* v. *Hamer*, 1 Dr. & Sm. 284; *Re Ridge*, 31 Ch. D. at p. 508; *Campbell* v. *Wardlaw*, 8 App. Cas. 641; or unless the case comes within one of the following exceptions:—

Lease by settlor.

(1) If reserved by a lease granted by the settlor, or pursuant to a contract entered into by him, the royalties are income to which the life-tenant is entitled: *Cowley* v. *Wellesley*, 35 Beav. 638; *Re Kemeys Tynte*, (1892) 2 Ch. 211.

Lease under power.

(2) If reserved by a lease granted under a power in the settlement, the life-tenant is entitled to the royalties, in the absence of a provision to the contrary: *Daly* v. *Beckett*, 24 Beav. 114; *Cowley* v. *Wellesley*, 35 Beav. 638; see *Campbell* v. *Wardlaw*, 8 App. Cas. at p. 650; unless the settlement is by way of trust for sale, in which case the life-tenant is only entitled to receive out of the rent and royalties a fair equivalent for the income which he would have received if the estate had been sold: *Wentworth* v. *Wentworth*, (1900) A. C. 163.

S. E. Act, 1877, s. 4.

(3) If the lease is granted under the powers of the Settled Estates Act, 1877, three fourth parts of the rent have to be set aside as capital: 40 & 41 Vict. c. 18, s. 4: see *Re Maynard*, (1899) 2 Ch. 347.

S. L. Act, 1882, s. 11.

(4) If the lease is granted under the powers of the Settled Land Act, 1882, three fourth parts of the rent have to be set aside as capital money, and the residue goes as rents and profits, unless a contrary intention is expressed in the settlement: 45 & 46 Vict. c. 38, s. 11; *Re Ridge*, 31 Ch. D. 504.

Improper working.

The proceeds of mines improperly opened by a life-tenant impeachable for waste, belong to the owner of the first vested estate of inheritance: see *Ferrand* v.

Wilson, 4 Ha. at p. 388; *Bagot* v. *Bagot*, 32 Beav. at p. 522; *Re Barrington*, 33 Ch. D. at p. 527; and the life-tenant is not allowed the income of the proceeds being treated as a wrong-doer: *Bagot* v. *Bagot*, 32 Beav. 509; see *ante*, p. 19.

Life-tenant without impeachment.

A life-tenant without impeachment of waste may open mines and take the produce, and is in general entitled to rents and royalties received under mining leases: see *Re Ridge*, 31 Ch. D. at p. 508.

S. E. Act, 1877, s. 4.

But if the lease is granted under the powers of the Settled Estates Act, 1877, one fourth part of the rent has to be set aside as capital: 40 & 41 Vict. c. 18, s. 4.

S. L. Act, 1882, s. 11.

So if the lease is granted under the powers of the Settled Land Act, 1882, he is only entitled to three fourth parts of the rent; the remaining one fourth part having to be set aside as capital money, unless a contrary intention is expressed in the settlement: 45 & 46 Vict. c. 38, s. 11.

Minerals taken by trespassers.

He is also entitled to compensation recovered from trespassers for minerals taken from the settled land during his life-tenancy: *Re Barrington*, 33 Ch. D. 523.

Mines sold with estate.

He is not entitled to any part of the proceeds of mines sold with the estate: see *Re Robinson*, (1891) 3 Ch. at p. 134; except in certain cases where the land is taken compulsorily: see *post*, pp. 31, 33.

CHAPTER III.

PROCEEDS OF SALE.

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Freeholds and copyholds.

WHERE settled freeholds or copyholds of inheritance are sold by trustees under a power of sale, the proceeds are capital which must be invested, the life-tenant being only entitled to the income of the investments.

A deposit received on a contract for sale, and forfeited on account of the purchaser's failure to complete, stands on the same footing: *Shrewsbury* v. *Shrewsbury*, 18 Jur. 397.

Leaseholds.

The proceeds of long leaseholds sold by order of the Court on account of their being unproductive and incapable of beneficial enjoyment by the life-tenant, have been treated in the same way: see *Lonsdale* v. *Berchtoldt*, 3 K. & J. 185.

But where settled leaseholds are sold by trustees without authority, the life-tenant is entitled to the proceeds if he survives the term: *Phillips* v. *Sarjent*, 7 Ha. 33.

As to proceeds of timber and minerals, see Ch. II.

Trust for sale: delay.

Where delay in executing a trust for sale results in an increased price being obtained at the expense of income, the life-tenant seems to be entitled to compensation out of the purchase-money: *Hibbert* v. *Cooke*, 1 Sim. & St. 552; *Re Burn*, W. N. 1879, 26.

Lands Clauses Act, ss. 69—71.

Where settled land is taken under the powers of the Lands Clauses Act, 1845, any sum paid by the promoters as purchase-money or compensation (including any sum

stipulated for by the life-tenant in lieu of accommodation works or for assenting to the promoters' bill) is in general capital which has to be invested, and only the income produced is payable to the life-tenant: see 8 & 9 Vict. c. 18, ss. 69—71.

Exceptions:—

(1) If the money does not exceed £20, the life-tenant is entitled to it (s. 72). S. 72.

(2) The Court may allot a portion of the money to the life-tenant as compensation for any injury, inconvenience, or annoyance, which he may be considered to sustain, independently of the actual value of the lands taken and of the damage occasioned to the lands held therewith (s. 73). S. 73.

(3) Where the purchase-money or compensation is paid in respect of any lease for life or years or any estate less than the fee, or of any reversion dependent on any such lease or estate, it may be applied in such manner as the Court considers will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate, or reversion, or as near thereto as may be (s. 74). S. 74.

Cases under L. C. Act.

The additional 10 per cent. paid for compulsory purchase, stands on the same footing as the rest of the purchase-money: *Re Wilkes*, 16 Ch. D. 597.

The life-tenant is not entitled to any part of the compensation money paid in respect of minerals, where there is no lease: *Re Robinson*, (1891) 3 Ch. 129; nor to the compensation paid for the enfranchisement of copyholds: *Re Wilson*, 2 J. & H. 619; or for withdrawing his opposition to the undertaking: *Pole* v. *Pole*, 13 W. R. 648; see *Taylor* v. *Chichester, &c. R. Co.*, L. R. 4 H. L. 628; unless he obtains an order under sect. 73, allowing him compensation in respect of any special injury sustained by him: see *Re Marlborough*, 15 L. T. O. S. 341; *Re Collis*, 14 L. T. 352; *Taylor* v. *Chichester, &c. R. Co.*, L. R. 4 H. L. 628; and see *post*, p. 76.

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Leaseholds.

Until recently, there was no settled rule as to the allowance to be made to a life-tenant of leaseholds taken under the Act (see *Re Birch*, 10 L. T. 690): the Court in some cases only allowing the life-tenant the income produced by the purchase-money until his death or the expiration of the term of the lease, and then determining his interest in the capital: see *Re Beaufoy*, 1 Sm. & G. 20; *Re Money*, 2 Dr. & Sm. 94; *Jeffreys* v. *Conner*, 28 Beav. 328; in other cases ordering payment to him of an annual sum larger than the interest produced by the fund, and raising the excess out of capital (*Re Birch*, 10 L. T. 690; *Re North*, 19 L. T. 43); or ordering so much of the capital to be paid, with the dividends, from time to time, as would exhaust the fund by the end of the term: *Re Long*, 1 W. R. 226; *Littlewood* v. *Pattison*, 10 Jur. N. S. 875; *Re Treacher*, 18 L. T. 810.

Present rule.

But the rule is now settled that in the case of ordinary leaseholds taken under the Act, the life-tenant is entitled to receive, out of the income and capital of the purchase-money, an annuity of such an amount as will exhaust the fund by the end of the term: *Askew* v. *Woodhead*, 14 Ch. D. 27.

Either a government annuity of the same amount as the net rent is ordered to be purchased (see *Re Pfleger*, 6 Eq. 426), or a reference to an actuary is directed, to calculate the amount to be raised every year out of the dividends and capital, in accordance with the above rule: *Re Phillips*, 6 Eq. 250; *Askew* v. *Woodhead*, 14 Ch. D. 27: half-yearly sales of capital being ordered for that purpose: see *Seton*, 2030.

Renewable leaseholds.

Leaseholds subject to a trust for perpetual renewal out of income, stand on a distinct footing: the life-tenant being only entitled to the interest on the purchase-money, although that may be less than the rent: *Re Wood*, 10 Eq. 572.

Ground rents.

Where settled land subject to a lease at a low ground rent is taken, the life-tenant is entitled during the

residue of the term to so much only of the income produced by the purchase-money as is equal to the rent: the rest of the income being accumulated till the end of the term, when (if still alive) he becomes entitled to the whole of the income arising from the purchase-money and from the accumulations during the remainder of his life: *Re Wootton*, 1 Eq. 589.

The same rule applies where the lease to which the property is subject was originally granted at a rack rent, but has become valuable owing to the rise in value of the land: *Re Mette*, 7 Eq. 72; *Re Wilkes*, 16 Ch. D. 597 (not following *Re Steward*, 1 Dr. 636).

If only part of the property subject to a lease is taken, and the tenant agrees to pay the same rent for the remainder, the whole of the income produced by the purchase-money must be accumulated till the expiration of the lease: *Re Griffith*, 49 L. T. 161.

Mineral lease.

But where coal comprised in a mineral lease was taken, the whole of the lessor's share of the compensation was ordered to be paid to the life-tenant, he being unimpeachable for waste: see *Re Barrington*, 33 Ch. D. 523.

Partition Act, 1868.

Where settled leaseholds are sold under the Partition Act, 1868 (31 & 32 Vict. c. 40), the life-tenant is only entitled to the dividends of the proceeds, without any allowance for loss of income; but he seems to have a right to re-investment in leaseholds: see *Langmead* v. *Cockerton*, 25 W. R. 315.

Settled Estates Act, 1877. Freeholds.

Where settled land is sold under the powers of the Settled Estates Act, 1877, the purchase-money is capital which has to be invested, and only the income produced is payable to the life-tenant: see 40 & 41 Vict. c. 18, ss. 34, 36.

Lease or reversion.

But where the purchase-money is paid in respect of any lease for life or years, or any estate less than the fee, or

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of any reversion dependent on any such lease or estate, it may be applied in such manner as the Court considers will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate, or reversion, or as near thereto as may be (s. 37) : see the cases on sect. 74 of the Lands Clauses Act, 1845, which is in substantially the same words : see *ante*, p. 32.

Renewable leaseholds.

In the case, however, of leaseholds subject to an overriding trust for renewal out of the rents, where renewal has become impossible, the life-tenant is only entitled to the income produced by the purchase-money: *Re Barber*, 18 Ch. D. 624.

Settled Land Act, 1882. Freeholds.

Where settled land is sold under the powers of the Settled Land Act, 1882, the proceeds are capital money which must be invested : the life-tenant being entitled to the income of the investments : see 45 & 46 Vict. c. 38, ss. 21, 22.

The price paid for underwood, manures and fixtures, stands on the same footing : *Re Rosher*, (1899) W. N. 134.

The price received on the exercise of an option of purchase contained in a building lease granted under the Act, is also capital money : 52 & 53 Vict. c. 36, s. 3.

Lease or reversion.

But where the purchase-money is paid in respect of a lease for years or life, or in respect of any other estate or interest less than the fee, or in respect of a reversion dependent on any such lease, estate or interest, it may be applied by the trustees of the settlement or the Court in such manner as in their judgment will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion, or as near thereto as may be : 45 & 46 Vict. c. 38, s. 34.

This enactment being in substantially the same words as the 74th section of the Lands Clauses Act, the cases

on that section apply: *Cottrell* v. *Cottrell*, 28 Ch. D. 628; see *ante*, p. 32.

Ground rents.

Accordingly, where settled land subject to a beneficial lease is sold under the Act, the life-tenant is only entitled during the residue of the term to so much of the income of the proceeds as is equal to the rent: the surplus being accumulated until the end of the term: *Cottrell* v. *Cottrell*, 28 Ch. D. 628; *Re Bowyer*, (1892) W. N. 48.

Heirlooms.

Proceeds of heirlooms sold under the Act, are capital money (s. 37): see *Re Marlborough*, 32 Ch. D. 1.

Copyhold Act, 1894.

Money paid for enfranchisement or for redemption or purchase of rent-charges under the Copyhold Act, 1894, is capital; but if it does not exceed £20 for all the enfranchisements or rent-charges in the manor, the Board of Agriculture have a discretion to direct it to be retained by the lord or person for the time being entitled to receive the rent-charge (although only a life-tenant) for his own use: 57 & 58 Vict. c. 46, ss. 26, 30, 31 (replacing similar provisions in the Copyhold Act, 1852).

Shares.

Proceeds of sale of settled shares in a company, including any sum realized in excess of the amount paid up on the shares are capital: *Re Armitage*, (1893) 3 Ch. 337; even though the shares have been purchased in breach of trust: *Re Bromley*, 55 L. T. 145.

Increase in value.

And if any investment is sold for more than it cost, the life-tenant is not entitled to any part of the increase in value: see *Verner* v. *Gen. & Com. Invest. Trust*, (1894) 2 Ch. at p. 258; but see *Hubert* v. *Fetherstone*, 1 P. Wms. 648 (where the order was made by consent).

Apportionment on change of investment.

The Apportionment Act, 1870, does not apply to a change of investment so as to render proceeds of sale apportionable in respect of accruing income not due at the date of sale, even where the life-tenant has died

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between the last payment of income and the sale: *Bulkeley* v. *Stephens*, (1896) 2 Ch. 241.

Accordingly, where stocks, shares or securities are sold between two dividend days, the life-tenant is not in general entitled to any apportionment of the proceeds in respect of the accruing dividend: *Scholefield* v. *Redfern*, 2 Dr. & Sm. 173; even if the sale takes place only a few days before the dividend becomes due: *Bostock* v. *Blakeney*, 2 Bro. C. C. 653.

The same rule applies to debentures and other property of that description, yielding interest accruing from day to day: *Scholefield* v. *Redfern*, 2 Dr. & Sm. 173.

Reason of Rule.

The rule against apportionment of proceeds of sale is founded on the heavy burden, in the shape of costs, to which a right of apportionment would subject settled property, by reason of the complex investigation which it might lead to on every change of investment: see *Scholefield* v. *Redfern*, 2 Dr. & Sm. at p. 183; accordingly, the rule is only departed from in cases of a special and exceptional nature: see *Freman* v. *Whitbread*, 1 Eq. at p. 276.

Thus, where the sale of stock was postponed until two months before dividend day, on account of the delay in completing a purchase of land, caused by difficulties of title, the Court refused to allow apportionment: *Freman* v. *Whitbread*, 1 Eq. 266.

Exceptional case.

But where trustees of settled consols contracted for the purchase of land to be completed just after dividend day, on the terms of taking the rents from that day, and about a month before the time sold out the consols (£500,000) *cum dividend*, on account of the Bank transfer books being closed at the time fixed for completion, the life-tenant was held entitled to the difference between the price obtained for the consols and their value *ex dividend*: *Londesborough* v. *Somerville*, 19 Beav. 295.

Sale by Court.

Apportionment is more readily allowed where the

sale takes place by direction of the Court; as where stock is sold shortly before the dividend becomes due, either for the benefit of the estate (*Bulkeley* v. *Stephens*, 3 N. R. 105), or for the purpose of distribution, instead of being transferred to the beneficiaries according to the trust: *Bulkeley* v. *Stephens*, (1896) 2 Ch. 241.

CHAPTER IV.

OUTGOINGS.

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Outgoings.

In determining how outgoings are to be borne as between life-tenant and remainderman, it seems right to assume (unless the contrary appears) that the settlor intended the settled property to be preserved intact for those entitled in remainder; accordingly it is submitted that ordinary outgoings of a recurring nature must in general be borne by income, in the absence of any provision in the settlement showing a contrary intention.

Rates and taxes.

Queen's taxes and local rates, assessed on the rental of the property, must therefore be discharged by the life-tenant, or, if the estate is managed by trustees, paid out of income (see *Re Redding*, (1897) 1 Ch. 876); unless the property is unproductive and incapable of beneficial enjoyment by the life-tenant: see *Lonsdale* v. *Berchtoldt*, 3 K. & J. 185.

Fee farm rents.

Fee farm rents and quit rents to which settled property is subject, appear to be equally within the above stated principle, and to be payable out of income accordingly.

Rent of leaseholds.

Rent reserved by the lease under which settled leaseholds are held appears to be payable out of income for the same reason: see *Re Millichamp*, 52 L. T. at p. 760; *Re Redding*, (1897) 1 Ch. 876; unless the property is unproductive and incapable of beneficial enjoyment by the life-tenant: see *Lonsdale* v. *Berchtoldt*, 3 K. & J. 185; and see *Allen* v. *Embleton*, 4 Dr. 226.

As to the liability of a life-tenant of leaseholds under a will, as between himself and the testator's estate, to pay the rent, see *Re Betty*, (1899) 1 Ch. 821; *Re Gjers*, (1899) 2 Ch. 54.

Insurance.

Freeholds and copyholds.

A life-tenant of freeholds or copyholds does not appear to be liable to insure against fire, unless made liable by some provision in the settlement or by statute: see *Re Bennett*, (1896) 1 Ch. at p. 787.

Leaseholds.

It is conceived that a life-tenant of leaseholds stands on the same footing; but where the property is managed by trustees, it would seem that the cost of keeping the same insured, in accordance with the covenants in the lease, has to be borne by income: see *Re Redding*, (1897) 1 Ch. 876; unless the property is unproductive and incapable of beneficial enjoyment by the life-tenant: see *Lonsdale* v. *Berchtoldt*, 3 K. & J. 185.

As to the liability of a life-tenant of leaseholds under a will, as between himself and the testator's estate, to insure, see *Re Betty*, (1899) 1 Ch. 821; *Re Gjers*, (1899) 2 Ch. 54.

Furniture.

A life-tenant of furniture seems not to be liable to insure, unless made liable by some provision in the settlement: see *Re Betty*, (1899) 1 Ch. at p. 829.

Trustee Act, 1893, s. 18.

By the Trustee Act, 1893, a limited power is given to trustees to insure and pay premiums out of income, without the consent of the life-tenant: 56 & 57 Vict. c. 53, s. 18 (re-enacting 51 & 52 Vict. c. 59, s. 7).

Statutory liability. Improvement of Land Act.

A life-tenant is bound to insure and keep insured against fire, all farmhouses, farm buildings, and works susceptible of damage by fire, which have been erected, improved or added to, under the Improvement of Land Act, 1864, in an amount equal to the principal amount originally secured by the charge under the Act, so long as any instalments are payable by him in respect thereof: 27 & 28 Vict. c. 114, s. 74.

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Limited Owners Residences Act.

He is bound to insure against fire to the same extent, any mansion-house erected, improved or added to, under the Limited Owners Residences Act, 1870: 33 & 34 Vict. c. 56, s. 8.

S. L. Act, 1882.

He is also bound to insure and keep insured at his own expense, any building or work in its nature insurable against damage by fire, which is comprised in any improvement executed under the Settled Land Act, 1882, in such amount (if any) as may be prescribed by the certificate of the Land Commissioners or their successors, the Board of Agriculture: 45 & 46 Vict. c. 38, s. 28; 52 & 53 Vict. c. 30, s. 2.

S. L. Act, 1887.

A similar liability exists to insure any improvement of a kind authorized by the Settled Land Act, 1882, in payment for which capital money is applied or deemed to be applied (see *post*, p. 85), under the powers of the Settled Land Act, 1887: 50 & 51 Vict. c. 30, s. 2.

Repairs.

Freeholds: Legal life-tenant.

A legal life-tenant of freeholds is not liable to repair, whether he be without impeachment of waste (*Lansdowne* v. *Lansdowne*, 1 J. & W. 522), or impeachable for waste (*Re Cartwright*, 41 Ch. D. 532); unless made liable by some provision in the settlement, or by statute: see *post*, p. 45; but see *Dunne* v. *Dunne*, 3 Sm. & G. at p. 28; *Re Leigh*, 6 Ch. at p. 892.

On the other hand, he is not entitled to have repairs done at the expense of the estate: *Brunskill* v. *Caird*, 16 Eq. 493; see *Dunne* v. *Dunne*, 3 Sm. & G. 22; nor is he entitled to a charge on the estate for repairs done by himself: *Hamer* v. *Tilsley*, Joh. 486. It makes no difference that the repairs are rendered necessary by dry rot, or by dilapidations existing at the date of the settlement: *Hibbert* v. *Cooke*, 1 Sim. & St. 552; *Re De Teissier*, (1893) 1 Ch. 153; *Re De Tabley*, 75 L. T. 328.

But permanent repairs done by order of the Court, to enable the property to be let, have been allowed out of

capital: *Macnolty* v. *Fitzherbert*, 27 L. J. Ch. 272; see, however, *Hill* v. *Maurice*, 16 L. J. Ch. 280.

Equitable life-tenant.

An equitable life-tenant of freeholds is not liable to repair, unless made liable by some provision in the settlement: *Powys* v. *Blagrave*, Kay, 495; 4 D. M. & G. 448; *Warren* v. *Rudall*, 1 J. & H. 1; *Re Hotchkys*, 32 Ch. D. 408; *Re Freman*, (1898) 1 Ch. 28; or by statute: see *post*, p. 45. But if he does repair, or allows the trustees to apply income in repairs, he cannot charge the expense on the estate: *Sharshaw* v. *Gibbs*, Kay, 333.

Where the estate is managed by trustees, it is conceived that ordinary current repairs must be discharged out of income; but if substantial repairs are necessary for the preservation of the property, the Court will on the application of the trustees, allow the cost to be raised out of capital, which, by reducing the income, divides the burden in fair proportions between the life-tenant and remainderman: see *Re Hotchkys*, 32 Ch. D. at pp. 415, 418, 420; and necessary repairs to property purchased under a power in a personalty settlement and held upon trust for sale, are chargeable in the same way: *Re Freman*, (1898) 1 Ch. 28.

Repairs required to be done to comply with a dangerous structure notice, given by a Local Authority, ought, it would seem, to be borne in the same way: see *Warren* v. *Rudall*, 1 J. & H. at p. 14; *Re De Teissier*, (1893) 1 Ch. at pp. 161, 162.

Copyholds.

A life-tenant of copyholds is not liable to repair: *Wood* v. *Gaynon*, Amb. 395; *Barnes* v. *Dowling*, 44 L. T. 809; unless made liable by some provision in the settlement or by statute: see *post*, p. 45; or by special custom: see *Blackmore* v. *White*, (1899) 1 Q. B. 293; and it is conceived that he has no greater right than a life-tenant of freeholds, to have repairs done at the expense of the estate.

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Leaseholds: legal life-tenant.

A legal life-tenant of leaseholds is not liable to repair, as between himself and the remainderman, even though the lease contain a covenant to keep in repair: *Re Parry & Hopkin*, (1900) 1 Ch. 160; unless made liable by some provision in the settlement or by statute: see *post*, p. 45. But it is conceived that he is not entitled to have repairs done at the expense of the estate.

Equitable life-tenant.

An equitable life-tenant of leaseholds seems to stand on the same footing; but may of course render himself liable by special contract: see *Marsh* v. *Wells*, 2 Sim. & St. 87.

Where the property is managed by trustees, it would seem that ordinary current repairs must be discharged out of income: see *Re Redding*, (1897) 1 Ch. 876; *Re Thomas*, (1900) 1 Ch. at p. 323; unless the property is unproductive and incapable of beneficial enjoyment by the life-tenant: see *Lonsdale* v. *Berchtoldt*, 3 K. & J. 185; and see *Allen* v. *Embleton*, 4 Dr. 226.

It is submitted that repairs required to be done by a dangerous structure notice given by a Local Authority, ought to be borne by capital, as in the case of freeholds, (see *ante*, p. 41); but see *Re Copland*, (1900) 1 Ch. 326.

Liability of settlor's estate.

As to the liability of a life-tenant of leaseholds under a will, as between himself and the testator's estate, in respect of current repairs: see *Re Betty*, (1899) 1 Ch. 821; *Re Gjers*, (1899) 2 Ch. 54 (not following *Re Baring*, (1893) 1 Ch. 61, and *Re Tomlinson*, (1898) 1 Ch. 232).

And as to the liability of the testator's estate in respect of dilapidations existing at the date of his death, see *Harris* v. *Poyner*, 1 Dr. 174; *Alden* v. *Kennerley*, 7 L. T. 312; *Pinfold* v. *Shillingford*, 46 L. J. Ch. 491; *Re Courtier*, 34 Ch. D. 136.

Special provisions.

A condition that the life-tenant shall keep the settled property in repair renders him liable to repair: *Caldwell* v. *Baylis*, 2 Mer. 408; *Woodhouse* v. *Walker*, 5 Q. B. D.

404; *Re Williames*, 54 L. T. 105; *Re Bradbrook*, 56 L. T. 106; *Dingle* v. *Coppen*, (1899) 1 Ch. 726; and to rebuild in case of fire; *Re Skingley*, 3 Mac. & G. 221; *Gregg* v. *Coates*, 23 Beav. 33; but see *Kingham* v. *Lee*, 15 Sim. 396; *Kinnersley* v. *Williamson*, 39 L. J. Ch. 788.

The cost of repairs may also be thrown upon income by a direction to repair out of the rents: *Crowe* v. *Crisford*, 17 Beav. 507; see *Cooke* v. *Cholmondeley*, 4 Dr. 326; or by a trust for management with power to repair and pay expenses of management out of the rents: *Clarke* v. *Thornton*, 35 Ch. D. 307; see *Re Baring*, (1893) 1 Ch. 61; *Debney* v. *Eckett*, 43 W. R. 54.

But a trust to keep houses in repair out of the rents applies only to ordinary repairs, and not to repairs which would be equivalent to rebuilding: *Crowe* v. *Crisford*, 17 Beav. 507; see *Pinfold* v. *Shillingford*, 46 L. J. Ch. 491.

On the other hand, a proviso that repairs shall be done at the direction of the life-tenant, and that expenses incurred in carrying out the trust shall constitute a charge on the premises, entitles him to have the cost of repairs raised out of capital: *Skinner* v. *Todd*, 46 L. T. 131.

A power for the trustees to make any outlay for the benefit of the estate out of income or capital, does not authorize them to charge repairs against capital: *Re De Tabley*, 75 L. T. 328.

The trustees' right to have the rents applied in keeping the property free from forfeiture (see *Re Fowler*, 16 Ch. D. 723), does not affect the rights of the life-tenant and remainderman as between themselves: *Re Courtier*, 34 Ch. D. 136.

Trust to invest in land.

A trust or power to invest money in land does not authorize expenditure in repairs, however necessary, if the limitations of the settlement are legal limitations: *Brunskill* v. *Caird*, 16 Eq. 493; *Drake* v. *Trefusis*, 10 Ch. 364; see *Dunne* v. *Dunne*, 3 Sm. & G. 22; although in

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several cases, where trustees had invested money in the purchase of old and dilapidated farm buildings, the Court has allowed further trust money to be applied in putting them into repair: see *Re Barrington*, 1 J. & H. 142; *Cowley* v. *Wellesley*, 46 L. J. Ch. 869; but see *Bostock* v. *Blakeney*, 2 Bro. C. C. 653.

Salvage.

But if the limitations of the settlement are equitable, the Court seems to have jurisdiction to authorize the expenditure, provided the repairs are necessary for the preservation of the property, though not otherwise: see *Re De Tabley*, 75 L. T. 328; *Re De Teissier*, (1893) 1 Ch. at p. 161; and see *Conway* v. *Fenton*, 40 Ch. D. 512.

Lands Clauses Act.

Money paid into Court under the Lands Clauses Act, 1845, in respect of settled land, is not applicable in executing repairs: see 8 & 9 Vict. c. 18, s. 69; *Re Leigh*, 6 Ch. 887; *Ex p. Barrett*, 19 L. J. Ch. 415; but see *Re Aldred*, 21 Ch. D. 228; and the power given by the Settled Land Act, 1882, to apply money so paid in as capital money arising under that Act (45 & 46 Vict. c. 38, s. 32) seems not to extend the jurisdiction in this respect: see *infra*.

Settled Estates Act.

Money received on a sale under the Settled Estates Act, 1877, cannot (it seems) be applied in executing repairs, inasmuch as the 34th section of the Act (40 & 41 Vict. c. 18) is no wider than sect. 69 of the Lands Clauses Act; and the jurisdiction seems not to be extended by the power given by the Settled Land Act, 1882, to apply such money as capital money under that Act (45 & 46 Vict. c. 38, s. 32); see *infra*.

Such an application, however, seems to have been allowed under the corresponding section of the Settled Estates Act, 1856, when the repairs were shown to be for the permanent benefit of the estate: *Re Clitheroe*, 17 W. R. 345; *Re Newman*, 9 Ch. 681.

Settled Land Acts.

The Settled Land Acts do not authorize the expenditure of capital money in doing ordinary repairs: *Clarke* v. *Thornton*, 35 Ch. D. 307; *Re De Teissier*, (1893) 1 Ch. 153; *Re Tucker*, (1895) 2 Ch. 468; and see *Re Daniell*, (1894) 3 Ch. 503.

Statutory liability.

A statutory liability to repair exists in the following cases:—

Land Drainage Act, 1845.

(1) A life-tenant is bound to keep in repair any buildings erected or built, or embankments or works for irrigation constructed or made, under the Land Drainage Act, 1845, and as if he were tenant for life subject to impeachment for waste: 8 & 9 Vict. c. 56, s. 11.

Public Money Drainage Act, 1846.

(2) A life-tenant is bound to uphold the drains on account of which a rent-charge has been created under the Public Money Drainage Act, 1846, and to keep clear and open the outfalls thereof, so long as any instalments of the charge are payable by him: 9 & 10 Vict. c. 101, s. 39.

Improvement of Land Act, 1864.

(3) A life-tenant is bound to uphold all improvements and works in respect of which a charge is made under the Improvement of Land Act, 1864, and to keep clear and open the outfalls and watercourses of all the drains (if any) so long as any instalments of the charge are payable by him, unless relieved from this liability by the certificate of the Inclosure Commissioners, or their successors, the Land Commissioners (45 & 46 Vict. c. 38, s. 48), or Board of Agriculture (52 & 53 Vict. c. 30, s. 2), that the maintenance of the works is not expedient or necessary: 27 & 28 Vict. c. 114, ss. 72, 76.

Settled Estates Act, 1877.

(4) A life-tenant seems bound (if the Court so directs) to allow the repair or maintenance of any streets, roads, paths, squares, gardens, open spaces, sewers, drains, watercourses, or other works executed under the Settled Estates Act, 1877, to be effected out of income during such period as to the Court shall seem advisable: 40 & 41 Vict. c. 18, s. 21.

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Settled Land Act, 1882.

(5) A life-tenant is bound to maintain and repair at his own expense every improvement executed under the powers of the Settled Land Act, 1882, during the period prescribed by the certificate of the Land Commissioners, or their successors, the Board of Agriculture: 45 & 46 Vict. c. 38, s. 28; 52 & 53 Vict. c. 30, s. 2.

Settled Land Act, 1887.

(6) A similar liability exists to maintain and repair any improvement of a kind authorized by the Act of 1882, in payment for which capital money is applied or deemed to be applied (see *post*, p. 85) under the powers of the Settled Land Act, 1887: 50 & 51 Vict. c. 30, s. 2.

Cleansing lake.

A life-tenant has been held not bound to cleanse a lake on the settled land, although directed by the settlement to keep the property in good repair and condition: *Dashwood* v. *Magniac*, (1891) 3 Ch. 306.

Keeping up mines.

If a life-tenant expends money in keeping up mines to prevent forfeiture, and the inheritance is benefited thereby, he seems to be entitled to be recouped out of capital: *Dent* v. *Dent*, 30 Beav. 363.

Compulsory drainage works.

Drainage work required by a Local Authority to be done under the Metropolis Local Management Acts, or the Public Health Acts, stands on a distinct footing from repairs, as it usually involves reconstruction at considerable cost: and not being an ordinary outgoing of a recurring nature, it seems to be more properly chargeable against capital than against income.

It is submitted that the provisions in the above mentioned Acts, throwing the cost on the persons for the time being in receipt of the rack-rent, were only intended to determine the liability as between landlord and tenant, and do not apply as between life-tenant and remainderman: see, however, *Re Crawley*, 28 Ch. D. 431; and see *Re Copland*, (1900) 1 Ch. 326.

In a recent case, the cost of work of this kind has been allowed out of capital as an improvement under the Settled Land Acts: *Re Thomas*, (1900) 1 Ch. 319.

Freeholds.

In the case of settled freeholds vested in trustees, the expense of drainage work done under the Public Health Act, 1848, has been held to be properly payable out of capital, notwithstanding a clause in the settlement imposing the liability to repair on the persons entitled to the rents: *Re Barney*, (1894) 3 Ch. 562.

Leaseholds.

In the case of leaseholds settled by way of trust for sale, with a direction to pay the intermediate rents and profits to the life-tenant, the cost of compulsory drainage work under the Public Health (London) Act, 1891, has been held to be payable out of capital: *Re Lever*, (1897) 1 Ch. 32; *Re Thomas*, (1900) 1 Ch. 319; but see *Re Copland*, (1900) 1 Ch. 326.

But where leaseholds were settled upon trust to pay the rents and profits to one for life, after payment of all ordinary outgoings, the life-tenant was held liable for the cost of compulsory drainage work under the Metropolis Local Management Act, which was thrown on the lessee by the covenants in the lease: *Re Crawley*, 28 Ch. D. 431; see, however, *Re Thomas*, (1900) 1 Ch. 319.

Paving and sewering expenses.

The expense of paving and sewering streets under the Metropolis Local Management Acts, and the Public Health Acts, seems to stand on the same footing as compulsory drainage expenses: see *supra*, and see *Re Field*, W. N. 1888, 36.

In one case, an equitable life-tenant of leaseholds subject to payment of all outgoings, was held not liable for expenses of paving done by a Local Authority in his lifetime, as the assessment was not made, and the instalments did not become payable, until after his death: *Re Boor*, 40 Ch. D. 572.

Arrears.

As to the liability of the settlor's estate in the case of

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a settlement by will, for outgoings in arrear at the date of his death, see *Re Cleveland*, (1894) 1 Ch. 164.

Apportionment.

The Apportionment Act, 1870, only deals with periodical payments in the nature of income, but the remedies given for recovering apportioned parts of such payments are subject to allowing proportionate parts of all just allowances: 33 & 34 Vict. c. 35, s. 4; see *ante*, p. 13.

It is conceived that rent, rates, taxes, and other annual outgoings, are apportionable under this section. As to the old law, see *Sutton* v. *Chaplin*, 10 Ves. 66.

CHAPTER V.

IMPROVEMENTS.

Improvements.

A LIFE-TENANT is not entitled to have improvements made at the expense of the estate, except under the express authority of the settlement or a statute: *Nairn* v. *Marjoribanks*, 3 Russ. 582; *Dunne* v. *Dunne*, 3 Sm. & G. 22; 7 D. M. & G. 207; and if he voluntarily spends money in building, draining, or otherwise improving the property, without such authority, he is not entitled to be repaid out of capital; *Caldecott* v. *Brown*, 2 Ha. 144; *Horlock* v. *Smith*, 17 Beav. 572; *Dixon* v. *Peacock*, 3 Dr. 288; *Mathias* v. *Mathias*, 3 Sm. & G. 552; *Dent* v. *Dent*, 30 Beav. 363.

Voluntary outlay.

The same rule applies to unauthorized improvements made by the trustees at the instance of the life-tenant: *Harris* v. *Harris*, 10 W. R. 826.

Except in cases of salvage, or where a power contained in the settlement, or conferred by statute applies, there is no jurisdiction to charge the estate with the cost of improvements; and the Court has accordingly refused to sanction the raising of money for pulling down and rebuilding houses on the estate for the mere purpose of increasing its value or rental: *Re Montagu*, (1897) 2 Ch. 8.

Jurisdiction of Court.

And where improvements in draining and building were made under order of the Court, out of income during the minority of the life-tenant, it was held that no part of the expense could be charged against capital: *Floyer* v. *Bankes*, 8 Eq. 115.

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But where it was necessary to pull down the mansion-house on account of the foundations having given way, and to rebuild on a fresh site, the Court authorized the cost to be raised by mortgage: *Frith* v. *Cameron*, 12 Eq. 169.

Salvage.

And where the life-tenant under a will had expended money in completing a mansion-house left unfinished by the testator, the Court directed an inquiry whether it was for the benefit of all parties interested, with the view of giving the life-tenant a charge on the estate: *Hibbert* v. *Cooke*, 1 Sim. & St. 552; *Dent* v. *Dent*, 30 Beav. 363.

As to the liability of the settlor's estate for the cost of performing the lessee's covenants to erect buildings on leasehold land settled by his will, see *Marshall* v. *Holloway*, 5 Sim. 196.

Special provisions.

A condition that the life-tenant shall keep the property in repair, does not render him liable to complete a building unfinished at the date of the settlement: *Joliffe* v. *Twyford*, 26 Beav. 227.

A trust to keep in repair out of the rents and profits, does not make the income liable for expenses of rebuilding: *Crowe* v. *Crisford*, 17 Beav. 507; *Cooke* v. *Cholmondeley*, 4 Dr. 326.

So, a trust to pay the rents to one for life, after deducting taxes, repairs, improvements, salaries, renewal fines, and all other necessary outgoings, was held not to throw on the life-tenant the expense of new buildings: *Walpole* v. *Boughton*, 12 Beav. 622.

Power of management.

An express power for trustees to make improvements out of either capital or income, is a power of management only, which does not enable them to decide how the expense is to be borne as between the life-tenant and remainderman; and improvements of a permanent nature effected under such a power are properly payable out of capital: *Re Bute*, 27 Ch. D. 196.

Accordingly, where income had been applied under such a power in constructing and enlarging wharves, docks and piers, the life-tenant was held entitled to a charge on the inheritance for the amount so applied: *Re Bute*, 27 Ch. D. 196.

So, the expense of fencing under such a power has been held to be payable out of capital: *Cowley* v. *Wellesley*, 1 Eq. 656.

As to conflict between the provisions of a settlement and the provisions of the Settled Land Acts, see *post*, p. 61.

Trust to invest in land.

A trust to invest money in land authorizes expenditure in erecting new buildings, either on land purchased under the trust (*Re Barrington*, 1 J. & H. 142), or on land already settled: *Drake* v. *Trefusis*, 10 Ch. 364 (in effect overruling *Poulett* v. *Somerset*, 19 W. R. 1048); or in rebuilding houses which are in a ruinous state, if beneficial to the estate: *Re Hotham*, 12 Eq. 76; *Drake* v. *Trefusis*, 10 Ch. 364; *Cowley* v. *Wellesley*, 46 L. J. Ch. 869; see *Jesse* v. *Lloyd*, 48 L. T. 656; and see *Re Pearson*, 21 W. R. 401; *Donaldson* v. *Donaldson*, 3 Ch. D. 743; but not in executing other improvements: *Bostock* v. *Blakeney*, 2 Bro. C. C. 653; *Dunne* v. *Dunne*, 3 Sm. & G. 22; 7 D. M. & G. 207; *Brunskill* v. *Caird*, 16 Eq. 493; *Drake* v. *Trefusis*, 10 Ch. 364; except so far as authorized by the settlement or by statute: see *Re Leslie*, 2 Ch. D. 185. The cases under the Lands Clauses Act and Settled Estates Act (*post*, pp. 52 and 53) are also authorities in point: *Drake* v. *Trefusis*, 10 Ch. at p. 366.

And where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, they may at the option of the life-tenant apply it as capital money arising under the Settled Land Act, 1882: 45 & 46 Vict. c. 38, s. 33; *Re Mundy*, (1891) 1 Ch. 399; see *post*, p. 56.

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Lands Clauses Act, 1845.

Money paid into Court under the Lands Clauses Act, 1845, in respect of settled land, being liable to be laid out in the purchase of land (8 & 9 Vict. c. 18, s. 69), could always be applied in erecting new buildings or rebuilding such as had become so ruinous as to require taking down, if an increased income would be produced thereby: see *Re Wight*, 6 W. R. 718; *Ex p. Melward*, 27 Beav. 571; *Re Dummer*, 2 D. J. & S. 515; *Drake* v. *Trefusis*, 10 Ch. 364; provided the remainderman did not object: *Re Leigh*, 6 Ch. 887; and in one case, where trade buildings had been rendered useless by the promoters' undertaking, the Court allowed part of the fund to be applied in taking them down and erecting dwelling-houses instead: *Re Johnson*, 8 Eq. 348.

Building and rebuilding.

Additions.

Money in Court under the Act has also been allowed to be applied in making remunerative additions to a house: *Re Speer*, 3 Ch. D. 262; see *Re Croker*, W. N. 1877, 38; but not in making unremunerative alterations: *Re Leigh*, 6 Ch. 887; although in one case where farm bnildings had been rendered uninsurable by the risk of fire from sparks of passing engines, the Court authorized the application of the fund in replacing a thatch roof with slates or tiles: *Re Johnson*, 8 Eq. 348; and small sums were occasionally paid out to a life-tenant on his undertaking to apply them in lasting improvements: see *Ex p. Barrett*, 19 L. J. Ch. 415.

Alterations.

The Court has refused to sanction the application of money under the Act in recouping past voluntary expenditure on improvements: *Re Leigh*, 6 Ch. 887; *Re Stock*, 42 L. T. 46; except with the consent of all parties interested: *Re Partington*, 11 W. R. 160.

But where the life-tenant had rebuilt houses which had been condemned under the dangerous structure clauses of the Metropolitan Building Act, 1855, the money in court was ordered to be applied in recouping him: *Ex p. Davis*, 3 De G. & J. 144.

S. L. Act, 1882, s. 32.

And now, money in court under the Act may be applied

as capital money arising under the Settled Land Act, 1882: 45 & 46 Vict. c. 38, s. 32; see *post*, p. 56.

Settled Estates Act, 1877.

Money paid into Court under the Settled Estates Act, 1877, in respect of settled land, being liable to be laid out in the purchase of land (40 & 41 Vict. c. 18, s. 34, re-enacting 19 & 20 Vict. c. 120, s. 23), could always be applied in erecting new buildings: see *Re Newman*, 9 Ch. 681; the Court being further empowered to direct payment thereout of the expense of making streets, roads, paths, squares, gardens, or other open spaces, sewers, drains or watercourses, including all necessary or proper fences, pavings, connexions and other works incidental thereto (40 & 41 Vict. c. 18, s. 21, re-enacting 39 & 40 Vict. c. 30, s. 1): see *Re Hilliard*, 38 L. T. 93; but not the expense of draining for agricultural purposes: *Re Poynder*, 50 L. J. Ch. 753; although the fund was in one case allowed to be applied in making an embankment to prevent the estate from being flooded (*Re Leadbitter*, 30 W. R. 378).

S. L. Act, 1882, s. 32.

And now, money in court under the Settled Estates Act, 1877, may be applied as capital money arising under the Settled Land Act, 1882: 45 & 46 Vict. c. 38, s. 32; see *post*, p. 56.

Land Drainage Act, 1845.

The expense of improvements by drainage, warping, irrigation, embankment or erection of buildings, effected by a life-tenant with the sanction of the Court under the powers of the Land Drainage Act, 1845, may be raised by a charge on the inheritance, created by a Master's certificate, and repayable by a limited number of annual instalments; the life-tenant being bound to pay such instalments as become due and payable during the continuance of his title: 8 & 9 Vict. c. 56, ss. 5—10.

Public Money Drainage Act, 1846.

The expense of drainage work done under the Public Money Drainage Act, 1846, may be raised by a charge

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on the land, created by the certificate of the Board of Agriculture (in whom the powers of the Inclosure Commissioners are now vested: 52 & 53 Vict. c. 30, s. 2), and repayable by a limited number of half-yearly instalments; the life-tenant being bound to pay such instalments as become payable during the continuance of his interest: 9 & 10 Vict. c. 101, ss. 34, 38.

Improvement of Land Act, 1864.

The expense of drainage, building and other improvements, effected by a life-tenant under the Improvement of Land Act, 1864, may be raised by a charge on the inheritance, created by the Board of Agriculture (in whom the powers of the Inclosure Commissioners are now vested: 52 & 53 Vict. c. 30), and repayable by half-yearly instalments; the life-tenant being bound to pay such instalments as become payable during the continuance of his interest: 27 & 28 Vict. c. 114, ss. 27, 51, 66.

The improvements authorized by this Act are the following, viz.:—

1. The drainage of land and the straitening, widening, deepening, or otherwise improving the drains, streams, and watercourses of any land:

2. The irrigation and warping of land:

3. The embanking and weiring of land from the sea or tidal waters, or from lakes, rivers, or streams, in a permanent manner:

4. The inclosing of lands, and the straitening of fences and redivision of fields:

5. The reclamation of land, including all operations necessary thereto:

6. The making of permanent farm roads, and permanent tramways and railways, and navigable canals, for all purposes connected with the improvement of the estate:

7. The clearing of land:

8. The erection of labourers' cottages, farmhouses,

and other buildings required for farm purposes, and the improvement of and addition to labourers' cottages, farmhouses, and other buildings for farm purposes already erected, so as such improvements or additions be of a permanent nature:

9. Planting for shelter:

10. The constructing or erecting of any engine-houses, water-wheels, saw and other mills, kilns, shafts, wells, ponds, tanks, reservoirs, dams, leads, pipes, conduits, watercourses, bridges, weirs, sluices, floodgates or hatches, which will increase the value of any lands for agricultural purposes:

11. The construction or improvement of jetties or landing places on the sea coast, or on the banks of navigable rivers or lakes, for the transport of cattle, sheep, and other agricultural stock and produce, and of lime, manure, and other articles and things for agricultural purposes; provided that the Commissioners (or the Board of Agriculture) are satisfied that such works will add to the permanent value of the lands to be charged to an extent equal to the expense thereof:

12. The execution of all such works as in the judgment of the Commissioners (or the Board of Agriculture) may be necessary for carrying into effect any matter hereinbefore mentioned, or for deriving the full benefit thereof: 27 & 28 Vict. c. 114, s. 9.

Limited Owners Residences Acts.

By the Limited Owners Residences Acts, 1870 and 1871, the erection or completion of a suitable mansion-house, with such other usual and necessary buildings, outhouses, and offices as are commonly appurtenant thereto, and held and enjoyed therewith, and the improvement of and addition to any such mansion-house, or any house capable of being converted into a suitable mansion-house, so as such improvement and addition be of a permanent nature, are to be deemed improvements under the Improvement of Land Act,

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1864, and may be charged on the estate, provided the sum charged does not exceed two years net rental of the estate: 33 & 34 Vict. c. 56, s. 4; 34 & 35 Vict. c. 84, s. 3; see *Re Dunn*, W. N. 1877, 39.

Limited Owners Reservoirs and Water Supply Act.

By the Limited Owners Reservoirs and Water Supply Further Facilities Act, 1877, the construction or erection of reservoirs or other works of a permanent character for the supply of water are to be deemed an improvement within the Improvement of Land Act, 1864, provided it is shown to the satisfaction of the Board of Agriculture (in whom the powers of the Inclosure Commissioners are now vested: 52 & 53 Vict. c. 30) that they will effect a permanent yearly increase in value of the settled land, or will be permanently productive of a yearly income exceeding the yearly amount proposed to be charged thereon: 40 & 41 Vict. c. 31, s. 5; and see 60 & 61 Vict. c. 44.

Extension of Improvement of Land Act.

The enumeration of improvements contained in sect. 9 of the Improvement of Land Act, 1864, is now extended so as to comprise all improvements authorized by the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 30); besides which, the provisions of the Act have recently been extended by the Act, 62 & 63 Vict. c. 46; and although the provisions of the Settled Land Acts are more favourable to life-tenants, it may still be desirable to resort to the powers of the Act of 1864 in certain cases; for example, where there is no capital money in hand; see *post*, p. 63.

Settled Land Act, 1882.

A life-tenant is entitled to have capital money arising under the Settled Land Act, 1882, applied in payment for any improvement authorized by the Act, provided the requirements of the 26th section are complied with: 45 & 46 Vict. c. 38, s. 21 (iii), s. 22 (2).

The improvements authorized by the Act, are the

making or execution on or in connexion with, and for the benefit of, the settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to, or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes (namely) :—

(1) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses :

(2) Irrigation, warping :

(3) Drains, pipes, and machinery for supply and distribution of sewage as manure :

(4) Embanking or weiring from a river or lake, or from the sea, or a tidal water :

(5) Groynes ; sea walls ; defences against water :

(6) Inclosing ; straightening of fences, re-division of fields :

(7) Reclamation ; dry warping :

(8) Farm roads ; private roads ; roads or streets in villages or towns :

(9) Clearing ; trenching ; planting :

(10) Cottages for labourers, farm servants, and artisans, employed on the settled land or not :

(11) Farmhouses, offices and outbuildings, and other buildings for farm purposes :

(12) Saw-mills, scutch-mills and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise :

(13) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing or other purposes, or for domestic or other consumption :

(14) Tramways ; railways ; canals ; docks :

(15) Jetties, piers, and landing places on rivers, lakes,

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the sea or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes:

(16) Markets and market places:

(17) Streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connexion with the conversion of land into building land:

(18) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connexion with any of the objects aforesaid:

(19) Trial pits for mines, and other preliminary works necessary or proper in connexion with development of mines:

(20) Reconstruction, enlargement, or improvement of any of those works: 45 & 46 Vict. c. 38, s. 25: see *post*, pp. 60, 61.

Agricultural Holdings Acts, 1883 to 1900.

Capital money arising under the Settled Land Act, 1882, may also be applied in payment of any moneys expended and costs incurred by a landlord under or in pursuance of the Agricultural Holdings (England) Acts, 1883 to 1900, in or about the execution of any of the following improvements, as if authorized by such Settled Land Act, viz.,

(1) Erection, alteration, or enlargement of buildings.
(2) Formation of silos.
(3) Laying down of permanent pasture.
(4) Making and planting of osier beds.
(5) Making of water meadows or works of irrigation.
(6) Making of gardens.
(7) Making or improving of roads or bridges.
(8) Making or improving of watercourses, ponds, wells,

or reservoirs, or of works for the application of water power or for supply of water for agricultural or domestic purposes.

(9) Making or removal of permanent fences.

(10) Planting of hops.

(11) Planting of orchards or fruit bushes.

(12) Protecting young fruit trees.

(13) Reclaiming of waste land.

(14) Warping or weiring of land.

(15) Embankments and sluices against floods.

(16) The erection of wirework in hop gardens.

(17) Drainage: 46 & 47 Vict. c. 61, s. 29; 63 & 64 Vict. c. 50, Sched. I. (substituted for Sched. I. of the Act of 1883 by 63 & 64 Vict. c. 50, s. 1).

Settled Land Act, 1890.

By the Settled Land Act, 1890, improvements authorized by the Act of 1882, also include the following; namely,

(1) Bridges;

(2) Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let;

(3) Erection of buildings in substitution for buildings within an urban sanitary district taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof;

(4) The rebuilding of the principal mansion-house on the settled land; provided that the sum to be applied under this sub-section does not exceed one half of the annual rental of the settled land: 53 & 54 Vict. c. 69, s. 13: see *post*, p. 61.

Housing of the Working Classes Act, 1890.

By the Housing of the Working Classes Act, 1890, the improvements authorized by the Settled Land Act, 1882, also include any dwellings available for the working

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classes, the building of which in the opinion of the Court is not injurious to the estate: 53 & 54 Vict. c. 70, s. 74 (re-enacting 48 & 49 Vict. c. 72, s. 11).

S. L. Acts Code.

Although the original jurisdiction of the Court seems not to be affected by the Settled Land Acts (*Re Montagu*, (1897) 1 Ch. 685), these Acts contain a complete code of authorized improvements, so that capital money arising under the Acts cannot be applied for any other purposes than those expressly mentioned: *Re Gerard*, (1893) 3 Ch. 252.

Cases on S. L. Act, 1882.

For example, capital money cannot be applied in pulling down and rebuilding houses on the estate for the mere purpose of increasing its value or rental: *Re Montagu*, (1897) 2 Ch. 8; nor in building a house for the estate agent: *Re Gerard*, (1893) 3 Ch. 252 (overruling, on this point, *Re Houghton*, 30 Ch. D. 102); nor in erecting silos, while experimental merely: *Re Broadwater*, 54 L. J. Ch. 1104; but see the Agricultural Holdings (England) Acts, *ante*, p. 58.

The following works have been held to be improvements within the Act of 1882, viz.:—

(1) An improved system of drainage of the mansion-house, or other houses on the estate, under sect. 25 (1): *Re Houghton*, 30 Ch. D. 102; *Re Thomas*, (1900) 1 Ch. 319.

(2) Fencing, under sect. 25 (6): *Re Verney*, (1898) 1 Ch. 508.

(3) Building cottages for labourers under sect. 25 (10), and rebuilding stables under sect. 25 (11): *Re Houghton*, 30 Ch. D. 102.

(4) The supply of water to the mansion-house or farms under sect. 25 (13): *Re Houghton*, 30 Ch. D. 102; *Re Tucker*, (1895) 2 Ch. 468; but not hot-water pipes or heating apparatus: *Re Gaskell*, (1894) 1 Ch. at p. 488.

(5) A new pumping-engine and pumps for draining

mines, under sect. 25 (19) (20): *Re Mundy*, (1891) 1 Ch. 399.

(6) Replacing the thatch roof of a farm building with galvanized iron, under sect. 25 (20): *Re Verney*, (1898) 1 Ch. 508; but evidence that the re-roofing is a permanent improvement, and does not fall under the head of repairs, is necessary: *Re Newton*, W. N. 1890, 24; see, however, the cases under sect. 13 of the S. L. Act, 1890, *infra*.

It is to be observed that, with a few exceptions introduced by the later Acts, the improvements authorized are calculated to render the settled land more remunerative: see *Re Gerard*, (1893) 3 Ch. at p. 262.

Cases on S. L Act, 1890. Additions and alterations.

'Additions and alterations' under sect. 13 (2) of the Settled Land Act, 1890, cover a new roof, and new entrance (if necessary for letting), but not hot-water pipes or heating apparatus: *Re Gaskell*, (1894) 1 Ch. 485; nor alterations in drainage and sanitary arrangements: *Re Tucker*, (1895) 2 Ch. 468.

Capital money cannot be expended on additions or alterations under this section, unless there is a present intention of letting: *Re De Teissier*, (1893) 1 Ch. 153; *Re Gerard*, (1893) 3 Ch. 252.

Rebuilding.

'Rebuilding,' in sect. 13 (4) of the Settled Land Act, 1890, includes reconstruction of part of the mansion-house: *Re Walker*, (1894) 1 Ch. 189; but not structural alterations or repairs: *Re De Teissier*, (1893) 1 Ch. 153; *Re Wright*, 83 L. T. 159.

Capital money cannot be applied under this section in rebuilding the mansion-house if it is in good condition: *Re Gerard*, (1893) 3 Ch. 252.

Conflict of powers.

The Settled Land Acts do not affect any powers exercisable by the life-tenant or the trustees under a settlement, or by statute or otherwise; but in case of conflict between the provisions of the settlement and

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the provisions of the Acts, relative to any matter in respect whereof the life-tenant exercises any power under the Acts, the provisions of the Acts prevail: 45 & 46 Vict. c. 38, s. 56.

Accordingly, improvements effected under the powers of the Settled Land Acts are payable out of capital, notwithstanding a trust for management under which they are, at the trustees' discretion, payable out of income: *Clarke* v. *Thornton*, 35 Ch. D. 307; *Re Stamford*, 56 L. T. 484; *Vine* v. *Raleigh*, (1891) 2 Ch. 13; but if the powers of the settlement are exercised the provisions of the settlement have to be followed, so long as the powers of the Acts are not resorted to: *Re Sudbury & Poynton*, (1893) 3 Ch. 74; see *Re Thomas*, (1900) 1 Ch. 319.

Scheme.

A scheme for the execution of the improvements, showing the proposed expenditure, must be submitted to and approved by the trustees of the settlement or the Court: 45 & 46 Vict. c. 38, s. 26; and this must be done before the work is commenced, otherwise it cannot be paid for out of capital money: *Re Hotchkin*, 35 Ch. D. 41; unless an order of the Court is obtained under sect. 15 of the Settled Land Act, 1890 (53 & 54 Vict. c. 69), sanctioning such payment.

Extras.

But extra expenditure, incidental to and necessary for the proper execution of the scheme may be allowed out of capital, unless the trustees' approval is conditional on the estimate not being exceeded: *Re Lytton*, 38 Ch. D. 20.

S. L. Act, 1890, s. 15.

The 15th section of the Settled Land Act, 1890, enables the Court to order capital money to be applied in payment for improvements authorized by the Settled Land Acts, 1882 to 1890, although executed without a scheme.

This section is retrospective, and enables the Court to

sanction payment for improvements made before the Act of 1890, though not for improvements made before the Act of 1882: see *Re Ormrod*, (1892) 2 Ch. 318.

The section is not excluded by the fact of the improvements having been already paid for by the life-tenant; but the Court takes a narrower view as to what are improvements under this section than where there is a scheme: see *Re Tucker*, (1895) 2 Ch. 468; but see *Re Thomas*, (1900) 1 Ch. 319.

Where no capital money in hand.

The trustees of the settlement can approve a scheme although there may be no capital money in hand: *Re Norfolk*, (1900) 1 Ch. 461; but a prospective order cannot be obtained for application of future capital money in paying for either future or past improvements, as payment can only be sanctioned when the work has been done and the capital money is in hand: *Re Millard*, (1893) 3 Ch. 116; *Re Bristol*, (1893) 3 Ch. 161.

It is doubtful whether the expenses of improvements can be allowed out of capital money under the Act after the land has been sold: *Re Hotchkin*, 35 Ch. D. 41.

As to applying capital money arising under one settlement in payment of improvements on another estate similarly settled, see *Re Byng*, (1892) 2 Ch. 219.

CHAPTER VI.

RENEWAL AND ENFRANCHISEMENT.

Renewal expenses.

BEFORE Lord Thurlow's time, the practice was for the life-tenant to pay one-third, and the remainderman two-thirds of the fines on renewal of leases: see *Verney* v. *Verney*, 1 Ves. Sen. 428; although, in some cases, the life-tenant was only ordered to keep down the interest on the amount raised: see *Buckeridge* v. *Ingram*, 2 Ves. Jun. 652.

Present rule.

But the rule is now settled that, in the absence of any provision in the settlement to the contrary, the fines and expenses of renewing leaseholds for years are borne by the life-tenant and remainderman in proportion to their actual enjoyment of the renewed lease, and not in proportion to their probable enjoyment as estimated by actuarial calculation: *Rawe* v. *Chichester*, Amb. 715; *Nightingale* v. *Lawson*, 1 Bro. C. C. 440; *White* v. *White*, 9 Ves. 554; *Giddings* v. *Giddings*, 3 Russ. 241; *Shaftesbury* v. *Marlborough*, 2 M. & K. 111; *Jones* v. *Jones*, 5 Ha. 440; *Hudleston* v. *Whelpdale*, 9 Ha. 775; *Bradford* v. *Brownjohn*, 3 Ch. 711; although in *Re Baring*, (1893) 1 Ch. 61, an actuarial valuation was adopted.

Leaseholds for lives.

The fines and expenses of renewing leaseholds for lives are apportionable in the same way: *White* v. *White*, 9 Ves. 554; *Shaftesbury* v. *Marlborough*, 2 M. & K. 111; *Cridland* v. *Luxton*, 4 L. J. Ch. 65; *Jones* v. *Jones*, 5 Ha. 440; the value of the *cestuis que vie's* lives being assumed at the expectation given in the tables framed for the purpose: *Bradford* v. *Brownjohn*, 3 Ch.

711; but see *Reeves* v. *Creswick*, 3 Y. & C. 715 (where actuarial calculation was resorted to for determining the amount of the benefit derived by the life-tenant).

Where life-tenant not benefited.

If the life-tenant derives no benefit from the renewal, as where he is already a *cestui que vie*, or dies during the original term, the fine and expenses fall entirely on capital, unless a contrary intention appears by the settlement: *Lawrence* v. *Maggs*, 1 Eden, 453; *Nightingale* v. *Lawson*, 1 Bro. C. C. 440; *Adderley* v. *Clavering*, 2 Cox, 192; *Harris* v. *Harris*, 32 Beav. 333; *Isaac* v. *Wall*, 6 Ch. D. 706.

When remainderman not benefited.

Conversely, if the remainderman derives no benefit from the renewal, by reason of the life-tenant outliving the period for which he renewed, the whole expense has to be borne by income: see *Lawrence* v. *Maggs*, 1 Eden, 453.

Settlor's liability.

As to the liability of the settlor's estate, in respect of a covenant by him to renew, where the leaseholds are settled by his will, see *Trail* v. *Jackson*, 46 L. J. Ch. 684.

Renewal by life-tenant.

If the life-tenant advances the amount required for the renewal fine, he is entitled to a charge on the estate for the amount payable by the remainderman: *Adderley* v. *Clavering*, 2 Cox, 192; see *Jones* v. *Jones*, 5 Ha. at p. 465; but he cannot claim to be recouped in his lifetime, as the extent of his enjoyment cannot be ascertained until his death: *Harris* v. *Harris*, 32 Beav. 333.

The amount payable by the remainderman carries compound interest at 4 per cent. until the life-tenant's death, and then simple interest at the same rate until payment: *Nightingale* v. *Lawson*, 1 Bro. C. C. 440; *Giddings* v. *Giddings*, 3 Russ. 241; *Cridland* v. *Luxton*, 4 L. J. Ch. 65; *Bradford* v. *Brownjohn*, 3 Ch. 711.

Renewal fine raised by mortgage.

If the renewal fine is raised by mortgage, the life-tenant is bound to keep down the interest, and may be required to give security for providing at his death the amount of

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his presumptive share, which may be ascertained prospectively by inquiry; and if he lives longer than is estimated, he may be called on to increase such security: *White* v. *White*, 9 Ves. 554; *Jones* v. *Jones*, 5 Ha. 440; *Hudleston* v. *Whelpdale*, 9 Ha. 775.

But the life-tenant's income cannot be impounded to provide for a future renewal: *Hudleston* v. *Whelpdale*, 9 Ha. 775; see *Isaac* v. *Wall*, 6 Ch. D. at p. 716.

In one case, the life-tenant's presumptive share of the cost of renewal was ordered to be secured by a policy of assurance on his life, directions being given for paying the premiums as well as the interest on the mortgage out of the rents: *Reeves* v. *Creswick*, 3 Y. & C. 715.

In other cases, an assurance on the life of the *cestui que vie* has been resorted to: see *Shaftesbury* v. *Marlborough*, 2 M. & K. 111; *Greenwood* v. *Evans*, 4 Beav. 44; although this seems to be contrary to principle: see *Hudleston* v. *Whelpdale*, 9 Ha. 775.

Special provisions.

The general rule apportioning the burden of renewal fines and expenses according to actual enjoyment, may be excluded by any provision in the settlement which shows a contrary intention: the question whether any provision has this effect, being one of construction in each case, but so far as the provisions in the settlement do not extend, the ordinary rule of apportionment according to enjoyment applies: *Plumtre* v. *Oxenden*, 25 L. J. Ch. 19.

It requires a clear direction in the settlement to make renewal expenses payable entirely out of income: see *Capel* v. *Wood*, 4 Russ. 500.

Thus, the general rule is not excluded by a direction for renewal expenses 'to be raised and paid out of the rents and profits;' although such a direction authorizes a sale or mortgage: *Allan* v. *Backhouse*, 2 V. & B. 65; Jac. 631; nor is it excluded by a trust to raise renewal fines out of the rents or by mortgage, whether the trust

is executed by the trustees (*Ainslie* v. *Harcourt*, 28 Beav. 313), or by the Court (*Jones* v. *Jones*, 5 Ha. 440); but see *Milles* v. *Milles*, 6 Ves. 761 (where the custom was to renew annually).

But where the first trust is to renew and pay the expenses out of the rents, the renewal expenses fall on the life-tenant: *Shaftesbury* v. *Marlborough*, 2 M. & K. 111; *Montfort* v. *Cadogan*, 2 Mer. 3; see *Stone* v. *Theed*, 2 Bro. C. C. 243; 5 Ha. 451 n.

So, a trust to pay renewal fines 'out of the annual rents and profits,' with power to raise any deficiency by mortgage, makes the fines payable out of income, if sufficient: *Solley* v. *Wood*, 29 Beav. 482.

But where successive life-tenants of leaseholds for lives are required to keep the lives full, each is only bound to fill up vacancies occurring in his own life-time, and the cost of making any renewal neglected by a life-tenant who dies insolvent, falls on capital: *Wadley* v. *Wadley*, 2 Coll. 11.

A trust to renew by sale or mortgage, throws the burden on capital: the life-tenant losing the rents of the part sold, or keeping down the interest in the case of a mortgage: *Plumtre* v. *Oxenden*, 25 L. J. Ch. 19; *Ainslie* v. *Harcourt*, 28 Beav. 313; and a direction to raise renewal fines by sale, seems to have the same effect; see *Jones* v. *Jones*, 5 Ha. at p. 461.

As to renewal of leaseholds settled by way of trust for sale, see *Keir* v. *Robins*, 2 Jur. 773.

Trustee Act, 1893, s. 19.

A trustee of renewable leaseholds is in certain cases empowered to renew and pay money required for the renewal out of any trust moneys in his hands, or to raise the amount by mortgage: 56 & 57 Vict. c. 53, s. 19 (re-enacting 51 & 52 Vict. c. 59, ss. 10, 11); but this enactment seems not to affect the rights of the life-tenant and remainderman *inter se:* see *Re Baring*, (1893) 1 Ch. at p. 65.

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Failure to renew.

If the life-tenant fails to renew as directed in the settlement, the Court may (it seems) appoint a receiver of the rents, so as to raise a renewal fund: see *Bennett* v. *Colley*, 2 M. & K. at p. 233; and his estate is at his death liable to the remainderman for the damage he sustains by reason of the failure to renew: *Bennett* v. *Colley*, 2 M. & K. 225.

Where trustees had omitted to renew out of the rents as directed by the settlement, the life-tenant's estate was held liable to make good the amount which ought to have been deducted from the rent paid to him: *Montfort* v. *Cadogan*, 2 Mer. 3.

And where the failure to renew was owing to the demand of an exorbitant fine, the life-tenant's estate was held liable for the amount of the reasonable fines which would have been paid if renewal had taken place at the usual time: *Colegrave* v. *Manby*, 2 Russ. 238.

Purchase of reversion.

If the life-tenant of settled leaseholds purchases the reversion, so that it becomes subject to the trusts of the settlement, he is entitled to a charge for the whole purchase-money, which carries interest at 4 per cent. from his death: *Mason* v. *Hulke*, 22 W. R. 622; *Isaac* v. *Wall*, 6 Ch. D. 706; *Rowley* v. *Ginnever*, (1897) 2 Ch. 503; see *Re Ranelagh*, 26 Ch. D. 590; and see *Yem* v. *Edwards*, 3 K. & J. 564.

23 & 24 Vict. c. 124.

Where the reversion on an ecclesiastical lease is purchased, and the purchase-money raised by trustees, under the powers of the Ecclesiastical Commissioners' Act, 1860 (23 & 24 Vict. c. 124, ss. 20, 35, 36, 37), it is conceived that the payment is properly treated as a capital expenditure; although the Court has refused to sanction such a purchase where it would have had the effect of seriously reducing the life-tenant's income: *Hayward* v. *Pile*, 5 Ch. 214; unless there was an overriding trust for renewal out of income: *Hollier* v. *Burne*, 16 Eq. 163.

And now, the reversion or freehold in fee of settled leaseholds may be purchased out of capital money arising under the Settled Land Act, 1882: 45 & 46 Vict. c. 38, s. 21 (vi). S. L. Act, 1882, s. 21.

Copyhold fines payable on a life-tenant's admittance which enures for the benefit of the remainderman, stand on the same footing as renewal fines in the case of leaseholds, and are borne by the life-tenant and remainderman in proportion to the benefits which they actually derive from the admittance; but if the life-tenant is only admitted for his life he bears the whole fine: see *Playters* v. *Abbott*, 2 M. & K. at p. 109; *Carter* v. *Sebright*, 26 Beav. 374; and see *Fitzwilliams* v. *Kelly*, 10 Ha. 266, as to the liability of the settlor's estate where he has covenanted to pay the fines. Copyhold fines.

The same rule applies where only the equitable interest in copyholds is settled; so that, in the absence of any provision in the settlement, fines paid on the admittance of new trustees are borne by the life-tenant and remainderman in proportion to the benefits which they actually derive from the admittance; and where the fines are not paid by the life-tenant in the first instance, he must give security that he will bear his due share: *Carter* v. *Sebright*, 26 Beav. 374; see *Bull* v. *Birkbeck*, 2 Y. & C. C. C. 447 (where the order was by consent).

But this rule may be excluded if a contrary intention is shown by the settlement, as in the case of fines for renewal of leaseholds: see *ante*, p. 66. Special provisions.

Thus, where copyholds were devised upon trust to raise the fines on admittance 'out of the rents and profits or by mortgage, sale or other disposition,' and subject thereto to pay the clear rents to the life-tenant, the fines were ordered to be raised by mortgage, and the life-tenant was held liable only to keep down the interest: *Playters* v. *Abbott*, 2 M. & K. 97. Trust to raise.

Where settled copyholds are enfranchised compulsorily Enfranchisement.

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at the instance of the lord, and the life-tenant pays the enfranchisement money, he is entitled to a charge for the amount, which carries interest from his death: *Isaac* v. *Wall*, 6 Ch. D. 706.

Copyhold Act, 1894.

Where the lord of a manor being only life-tenant, purchases a tenant's interest, and charges the land with the purchase-money under the powers of the Copyhold Act, 1894 (57 & 58 Vict. c. 46, s. 36 (3)), it is conceived that he is only bound to keep down the interest on the charge as in the case of other incumbrances (see *post*, p. 79).

Enfranchisement.

So, where the life-tenant of copyholds effects an enfranchisement, and charges the land with the enfranchisement money under the Copyhold Act, 1894 (57 & 58 Vict. c. 46, s. 36 (1)), it is apprehended that he is under no greater liability.

S. E. Act, 1877.

Where enfranchisement is obtained for the purpose of effecting a sale under the Settled Estates Act, 1877, the cost of the enfranchisement may be allowed out of the proceeds of sale: see *Re Adair*, 16 Eq. 124.

S. L. Act, 1882.

And now, money required for enfranchisement may be paid out of capital money arising under the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 21 (v)); and if raised by the life-tenant on mortgage of the settled land under the powers of the Act (see s. 18), it is conceived that he is only liable to keep down the interest.

CHAPTER VII.

COSTS AND EXPENSES.

Trustees' costs.

ALTHOUGH trustees are not bound to part with income until their costs are provided for (*Stott* v. *Milne*, 25 Ch. D. 710), they have no power to charge against income, costs which ought to be borne by capital: *Re Weall*, 42 Ch. D. 674.

Succession duty account.

The costs of preparing and rendering a succession duty account in respect of the life-tenant's interest under a will, are payable out of income: *Cowley* v. *Wellesley*, 1 Eq. 656.

Estate duty account.

But it is conceived that the costs of an account rendered for purposes of estate duty, which is a charge on capital (see 57 & 58 Vict. c. 30, s. 9), are properly payable out of capital.

Receiver.

A receiver's poundage, and the costs of passing his accounts, are payable out of income: *Shore* v. *Shore*, 4 Dr. 501; see *Bainbridge* v. *Blair*, 4 L. J. Ch. 207.

Audit and stocktaking.

Where settled residue comprised capital left in a business, the expenses of a yearly audit and stocktaking which had been stipulated for by the testator, were held to be payable out of capital: *Re Bennett*, (1896) 1 Ch. 778.

Appointment of new trustees.

The costs of appointing new trustees come out of capital: see *Carter* v. *Sebright*, 26 Beav. at p. 377; *Harvey* v. *Olliver*, W. N. 1887, 149; and see *Re Wood*, 7 Jur. N. S. 323; and so do the costs of obtaining a vesting order: *Ex p. Davies*, 16 Jur. 882; and see *post*, p. 77.

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Where only one trustee was appointed by the will, and the fund was large, the costs of appointing an additional trustee were allowed out of capital: *Grant* v. *Grant*, 34 L. J. Ch. 641; but where the fund was small, and the reversioners petitioned for the appointment of a second trustee, they were ordered to pay the costs: *Re Brackenbury*, 10 Eq. 45; and see *Re Sheppard*, 7 L. T. 377.

Where a suit by trustees to be discharged is occasioned by the life-tenant's acts, the costs are payable out of of income: *Coventry* v. *Coventry*, 1 Keen, 758.

Investment.

The costs of investing trust funds pursuant to a direction contained in the settlement, are payable out of capital; but where the life-tenant voluntarily paid the trustees' costs of investment, his executors were held to have no right to be recouped out of capital: *Horlock* v. *Smith*, 17 Beav. 572.

The costs of a proper application by trustees for advice as to investment, are payable out of capital: *Hume* v. *Richardson*, 8 Jur. N. S. 686; *Re Knowles*, 18 L. T. 809.

Proceedings for protection of estate.

Costs of proceedings properly taken by trustees for the protection of the estate, either by action (*Stott* v. *Milne*, 25 Ch. D. 710), or by way of parliamentary opposition (*Re Ormrod*, (1892) 2 Ch. 318), are payable out of capital.

A provision in the settlement for payment of the trustees' costs out of income does not apply to their costs of an unsuccessful action for waste, brought by them against the life-tenant at the instance of the remainderman, but such costs come out of capital: *Powys* v. *Blagrave*, 4 D. M. & G. 448.

Settlement by ward.

The costs of a settlement of the property of an infant ward of Court are payable out of capital: *De*

Stacpoole v. *De Stacpoole*, 37 Ch. D. 139; and see *Anon.*, 4 Russ. 473.

Life-tenant's costs.

Application for his sole benefit.

Costs of proceedings by a life-tenant in respect of his life interest under the settlement, if for his sole benefit, cannot in general be charged against capital: *Croggan* v. *Allen*, 22 Ch. D. 101.

The life-tenant has accordingly been held liable for:—

(1) Costs of originating summons to be let into possession of the settled estates: *Re Bagot*, (1894) 1 Ch. 177; *Re Hunt*, (1900) W. N. 65; although in *Re Newen*, (1894) 2 Ch. 297, the reversioner was made to pay his own costs.

(2) Costs of application for change of investment: *Equitable Assce. Co.* v. *Fuller*, 30 L. J. Ch. 497; *Re Tennant*, 60 L. T. 488.

(3) Costs of administration suit, so far as caused by questions as to the income account: *Horn* v. *Coleman*, 26 L. J. Ch. 544; *Croggan* v. *Allen*, 22 Ch. D. 101.

(4) Costs of petition in an administration suit for payment of income: *Eady* v. *Watson*, 33 Beav. 481; see *Pratt* v. *Jenner*, 12 Jur. N. S. 557; but see *Scrivener* v. *Smith*, 8 Eq. 310, and *Longuet* v. *Hockley*, 22 L. T. 198 (where such costs were allowed out of capital).

(5) Costs of reference to determine whether the life-tenant had complied with the conditions of the settlement: *Winthrop* v. *Winthrop*, 15 L. J. Ch. 403.

Applications determining remainderman's rights.

If the life-tenant's application is also the means of determining the remainderman's rights, the costs are generally allowed out of capital.

Examples:—

(1) Costs of proceedings to enforce the life-tenant's right to investment in leaseholds in accordance with the provisions of the settlement: *Beauclerk* v. *Ashburnham*, 8 Beav. 322.

(2) Costs of special case for determining the right of

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the life-tenant's executors to apportionment of dividends accruing at his death: *Lawrence* v. *Lawrence*, 26 Ch. D. 795.

(3) Costs of action for determining how the costs of proceedings taken by the trustees for the protection of the estate are to be borne: *Stott* v. *Milne*, 25 Ch. D. 710.

Apportionment.

But where the only question is as to the proportions in which the life-tenant and remainderman ought to contribute to a fund which has to be raised, or to share a fund which has to be divided, the costs are apportioned rateably between capital and income.

Examples:—

(1) Costs of proceedings for deciding how a renewal fund should be raised and borne: *Reeves* v. *Creswick*, 3 Y. & C. 715.

(2) Costs of proceedings for apportionment of a reversionary interest on its falling in: *Wilkinson* v. *Duncan*, 23 Beav. 469; *Re Chesterfield*, 24 Ch. D. at p. 654.

Payment into Court under Trustee Act, 1893.

The costs of paying a trust fund into Court, under the 42nd section of the Trustee Act, 1893, seem to come out of capital, as in cases of payment into Court under the Trustee Relief Acts, which it replaces: see *Re Ingram*, 2 W. R. 679; *Re Staples*, 13 Jur. 273; *Re Whitton*, 8 Eq. 352.

Payment out of income.

But the costs of the life-tenant's application for payment of dividends of a fund in court under the Act, seem to be payable out of income, by analogy to the practice under the Trustee Relief Acts, which was settled by the decisions in *Re Marner*, 3 Eq. 432, and *Re Evans*, 7 Ch. 609.

The trustees' costs of appearance on the application, if allowed at all (see *Re Battell*, 21 W. R. 138), seem also to be payable out of income: see *Re Evans*, 7 Ch. 609.

Redemption suit.

The costs of a life-tenant's suit to redeem mortgages on the settled estate, are payable out of capital: *Pawley*

v. *Colyer*, 3 D. J. & S. 676; and so are his costs of settling a foreclosure action brought by the mortgagees: *More* v. *More*, 37 W. R. 414; and also his costs of suit against the estate to enforce his charge, in respect of incumbrances paid off by him: *Selby* v. *Selby*, 2 Jur. 106; *More* v. *More*, 37 W. R. 414.

Proceedings for protection of estate.

Costs incurred by a life-tenant in proceedings taken for the protection of the settled estate have been allowed by the Court out of capital under its ordinary jurisdiction: *Re De la Warr*, 16 Ch. D. 587; and were also allowed out of capital under the powers of the Settled Estates Act, 1877 (40 & 41 Vict. c. 18, s. 17, repealed by 45 & 46 Vict. c. 38): see *Re De la Warr*, 46 L. T. 340; *Re Twyford Abbey*, 30 W. R. 268.

But the Court refused to allow out of capital the costs of a proposed application to Parliament for authority to sell: *Stanford* v. *Roberts*, 52 L. J. Ch. 50.

Settled Land Act, 1882, s. 36.

Now, however, the Court is expressly empowered to direct that any costs, charges, or expenses incurred, or to be incurred in relation to any action, defence, petition to Parliament, parliamentary opposition or other proceeding, taken or proposed to be taken for protection of settled land, be paid out of property subject to the settlement: 45 & 46 Vict. c. 38, s. 36 (replacing 40 & 41 Vict. c. 18, s. 17).

The costs of a life-tenant's successful proceedings in Parliament to establish his title to an earldom, with which the settled estates devolved, have been allowed out of capital under this section: *Re Aylesford*, 32 Ch. D. 162; but see *Re Blake*, 72 L. T. 280.

Enfranchisement under Copyhold Act.

Where the lord of a manor, being only life-tenant, charges the manor with expenses incurred by him in purchasing or enfranchising a copyhold interest under the Copyhold Act, 1894 (57 & 58 Vict. c. 46, ss. 36, 37), it is conceived that he is only bound to keep down the

interest on the charge, as in the case of other incumbrances: see *post*, p. 79.

So where the life-tenant of copyholds charges the land with the expenses of enfranchisement incurred by him under the Copyhold Act, 1894 (57 & 58 Vict. c. 46, s. 36), it is apprehended that he is under no greater liability.

Inclosure expenses.

Inclosure expenses raised by mortgage or sale under the powers of the Inclosure Act, 1845 (8 & 9 Vict. c. 118, ss. 133, 134), have also, it is conceived, to be borne by capital (see s. 137); the life-tenant, in the case of a mortgage, being bound to keep down the interest (s. 133).

The life-tenant seems to be entitled to be recouped out of capital all inclosure expenses properly paid by him under the Act, although he dies without having charged them on the inheritance in the manner prescribed by the Act: see *Vernon* v. *Manvers*, 31 Beav. 617.

Costs under Lands Clauses Act.

The life-tenant's costs properly incurred in relation to a sale of the estate under the Lands Clauses Act, 1845, may be allowed by the Court out of capital under the 73rd section: *Re Strathmore*, 18 Eq. 338; including costs of arbitration by sect. 34 thrown on the life-tenant by reason of his having claimed too much: *Re Aubrey*, 1 W. R. 464; *Re Berkeley*, 10 Ch. 56; and costs of negotiation: *Re Oldham*, W. N. 1871, 190; but not his costs of opposing the promoters' bill in Parliament: *Re Berkeley*, 10 Ch. 56.

The costs of trustees or remaindermen unnecessarily served by a life-tenant with a petition for interim investment, are payable out of income: *Re Dowling*, 24 W. R. 729; but where necessarily served with a petition for reinvestment, owing to the existence of an administration suit, or the provisions of a private Act, their costs of appearance have been allowed out of capital: *Wilson* v. *Foster*, 28 L. J. Ch. 410; *Re Bowes*, 10 L. T. 598.

Where a petition for payment out has to be served on

the Official Solicitor by reason of the life-tenant's neglect, the costs of such solicitor are payable out of income: *Re Clarke*, 21 Ch. D. 776.

Costs under S. E. Acts.

The costs of a life-tenant's petition under the Settled Estates Act, 1856, for power to lease, were allowed out of capital: *Re Dorning*, 14 W. R. 125; *Wheeler* v. *Tootel*, 16 W. R. 273; see *Lovat* v. *Leeds*, 11 L. T. 442; and the Court has the same power of allowing costs out of capital under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18, s. 41, re-enacting 19 & 20 Vict. c. 120, s. 29).

Costs under S. L. Acts.

Capital money arising under the Settled Land Act, 1882, may be applied in payment of costs, charges and expenses of or incidental to the exercise of any of the powers or the execution of any of the provisions of the Act (45 & 46 Vict. c. 38, s. 21 (x)).

The following costs have accordingly been allowed out of capital money:—

(1) The ordinary costs of a sale under the Act, including, in the case of several persons together constituting the tenant for life, the extra costs of completion occasioned by their employing separate solicitors: *Smith* v. *Lancaster*, (1894) 3 Ch. 439.

(2) The costs of an abortive sale: *Re Smith*, (1891) 3 Ch. 65; see *Re Beck*, 24 Ch. D. 608.

(3) The costs and fees of the life-tenant's solicitor and surveyor in preparing and carrying out a proper scheme for improvements: *Re Stamford*, 43 Ch. D. 84.

(4) The costs of an application for appointing trustees for the purposes of the Act: *Williams* v. *Jenkins*, (1894) W. N. 176.

(5) The life-tenant's costs of defending an unsuccessful action brought to restrain him from exercising his statutory power of sale (beyond the party and party costs received by him): *Re Llewellin*, 37 Ch. D. 317.

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But the Act does not charge capital with costs properly payable out of income, such as the costs of an unnecessary survey and valuation ordered by the life-tenant: *Re Eyton*, W. N. 1888, 254; or the costs of obtaining the concurrence of the life-tenant's incumbrancers: *Cardigan* v. *Curzon-Howe*, 41 Ch. D. 375; although in one case such costs were allowed out of capital: see *Re Beck*, 24 Ch. D. 608.

Raising costs.

When a life-tenant is declared entitled to his costs out of the trust property, and the funds in hand are not sufficient, he has a right to have the deficiency raised by an immediate sale: *Burkett* v. *Spray*, 1 Russ. & M. 113.

Costs out of wrong fund.

An order for payment of costs out of a fund does not necessarily determine the ultimate liability of the fund to bear them; and where costs properly payable out of capital have been ordered to be paid out of a fund representing income, the rights of the parties may be adjusted without an appeal: *Sheppard* v. *Sheppard*, 33 Beav. 129.

CHAPTER VIII.

INCUMBRANCES.

THE old rule charging life-tenants of incumbered estates with part of the principal of the incumbrances, has long been obsolete: see *Kekewich* v. *Marker*, 3 Mac. & G. at p. 328: the modern rule being that, in the absence of any provision to the contrary in the settlement, the life-tenant is liable, as between himself and the remainderman, to keep down the interest on all incumbrances out of the rents and profits of the estate, but not to discharge any part of the principal: *Revel* v. *Watkinson*, 1 Ves. Sen. 93; *Peterborough* v. *Mordaunt*, 1 Eden, 474; *Kinnoul* v. *Money*, 3 Sw. 202 n.; *Penrhyn* v. *Hughes*, 5 Ves. 99; *Raffety* v. *King*, 1 Keen, 601; *Burges* v. *Mawbey*, T. & R. 167; *Marker* v. *Kekewich*, 8 Ha. 291; *Dixon* v. *Peacock*, 3 Dr. 288; even though the incumbrances be created by the life-tenant himself under an absolute power of appointment: *Whitbread* v. *Smith*, 3 D. M. & G. 741; and the life-tenant does not get rid of this liability by taking a transfer of the incumbrances: *Long* v. *Harris*, 24 L. T. O. S. 297.

Present rule.

The rule that the life-tenant must keep down interest on incumbrances, applies to a settlement by will of real estate subject to a charge of debts: *Wastell* v. *Leslie*, 13 L. J. Ch. 205; *Shore* v. *Shore*, 4 Dr. 501; and as well to interest during the first year from the testator's death as afterwards: *Barnes* v. *Bond*, 32 Beav. 653; *Marshall* v. *Crowther*, 2 Ch. D. 199 (not following *Greisley* v. *Chesterfield*, 13 Beav. 288); even where other

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property primarily liable does not become available for a considerable period: *Hawkins* v. *Hawkins*, 6 L. J. Ch. 69; see *Shore* v. *Shore*, 4 Dr. 501.

Failure to keep down interest.

If the life-tenant fails to keep down the interest on a charge, his subsequent income is liable to recoup the remainderman the additional amount which has to be raised in consequence: *Waring* v. *Coventry*, 2 M. & K. 406; *Makings* v. *Makings*, 1 D. F. & J. 355; and in such a case the remainderman seems entitled to a receiver: see *Kensington* v. *Bouverie*, 7 H. L. C. at p. 575.

But in some cases where the estate has been settled as a provision for the settlor's family, the Court has allowed the life-tenant maintenance out of the income, although insufficient for keeping down the interest: *Revel* v. *Watkinson*, 1 Ves. Sen. 93; see *Burges* v. *Mawbey*, T. & R. at p. 174.

Insufficient income.

If the rents are insufficient to keep down the interest, the life-tenant is entitled to have the incumbrance raised by sale: *Penrhyn* v. *Hughes*, 5 Ves. at p. 107; *Cooke* v. *Cholmondeley*, 4 Dr. 244; but see *Kinnoul* v. *Money*, 3 Sw. at p. 208 n.; and if he regularly pays the interest during his life, without giving the remainderman notice of the insufficiency of the rents, or of his intention to claim a charge on the estate for the excess, he is not entitled to such a charge: *Kensington* v. *Bouverie*, 7 H. L. C. 557; see *Dixon* v. *Peacock*, 3 Dr. 288.

Where the income is only temporarily insufficient to keep down the interest on a mortgage, the arrears are payable out of subsequent income accruing during the same life-tenancy: *Revel* v. *Watkinson*, 1 Ves. Sen. 93; *Tracy* v. *Hereford*, 2 Bro. C. C. 128.

Arrears of interest remaining at the death of the first life-tenant are, however, a charge on the inheritance, and not on the income of a subsequent life-tenant: *Sharshaw* v. *Gibbs*, Kay, 333; see *Revel* v. *Watkinson*,

1 Ves. Sen. at p. 94; but see *Penrhyn* v. *Hughes*, 5 Ves. at p. 107.

Mortgagee in possession.

Where a mortgagee of the settled estate enters and receives rents in excess of the interest payable, the life-tenant is entitled to a charge on the inheritance for the excess: *Faulkener* v. *Daniel*, 10 L. J. Ch. 33; *Pawley* v. *Colyer*, 3 D. J. & S. 676; subject, however, to a set-off of any interest on other incumbrances allowed by him to fall into arrear: *Scholefield* v. *Lockwood*, 12 W. R. 114.

Several estates.

Where several estates are settled together by the same settlement, the income of each is liable to be applied in keeping down the interest on the incumbrances affecting the others: *Frewen* v. *Law Life Assce. Soc.*, (1896) 2 Ch. 511; see *Re Hotchkys*, 32 Ch. D. 408; and see *Re Monson*, (1898) 1 Ch. 427; and it makes no difference that one of the estates is settled by way of trust for sale: *Bond* v. *Biggs*, 6 L. T. 794.

But the life-tenant incurs no personal liability by reason of his enjoyment of any property not producing income: *Syer* v. *Gladstone*, 30 Ch. D. 614.

Charge of legacies.

Where an estate is settled subject to a charge of legacies, any interest payable on the legacies is payable out of income: *Milltown* v. *Trench*, 4 Cl. & F. 276; *Makings* v. *Makings*, 1 D. F. & J. 355.

Charge of annuities.

Where a settled estate is charged by the settlement with a life annuity, the life-tenant must keep down the instalments out of income, and is not entitled to have a government annuity purchased out of capital to satisfy it: *Re Grant*, 52 L. J. Ch. 552; but if the income is insufficient, so that there are arrears at the annuitant's death, the life-tenant is only bound to keep down the interest on the arrears: *Prince* v. *Cooper*, 17 Beav. 187.

Where, however, an estate is settled by will charged

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with life annuities which the testator was personally liable to pay, the annuities must be capitalized, and the capitalized value treated as a charge on the inheritance: *Re Muffett*, 39 Ch. D. 534; the life-tenant being only bound to keep down the interest on the capitalized value: *Bulwer* v. *Astley*, 1 Ph. 422; *Re Harrison*, 43 Ch. D. 55; *Re Bacon*, 62 L. J. Ch. 445 (not following *Yates* v. *Yates*, 28 Beav. 637); and if the life tenant pays any instalments of the annuities, he is entitled to a charge for the amount: *Re Harrison*, 43 Ch. D. 55; *Re Bacon*, 62 L. J. Ch. 445.

Legacy duty.

Legacy duty payable in respect of a settled legacy is payable out of capital, if the life-tenant and remainderman are chargeable at the same rate; but if chargeable at different rates, the duty on the life-interest is payable by the life-tenant, and the duty on the remainder by the remainderman: see 36 Geo. III. c. 52, ss. 12, 13; *Bowra* v. *Rhodes*, 10 W. R. 747; and see *Londesborough* v. *Somerville*, 19 Beav. 295.

Succession duty.

The succession duty payable on the succession of a life-tenant to real property, is a charge on his interest only (see 16 & 17 Vict. c. 51 ss. 21, 42), and accordingly has to be borne by him.

In the case of personal property comprised in a succession, the 12th section of 36 Geo. III. c. 52 applies (16 & 17 Vict. c. 51, s. 32); so that where the life-tenant and remainderman are chargeable at the same rate, the duty is a charge on capital: *A.-G.* v. *Aberdare*, (1892) 2 Q. B. 684; and in such a case if the duty is paid by the life-tenant, he is entitled to be recouped out of capital: *Cuddon* v. *Cuddon*, 4 Ch. D. 583.

Estate duty.

Estate duty under the Finance Act, 1894, is a charge on capital, and if paid by the life-tenant, he is entitled to a charge for the amount: see 57 & 58 Vict. c. 30, s. 9; but if raised by mortgage, he must keep down the interest: *Re Parker-Jervis*, (1898) 2 Ch. 643.

Settlement estate duty is also payable out of capital: see 57 & 58 Vict. c. 30, s. 5; 59 & 60 Vict. c. 28, s. 19.

Special provisions.

In order that the liability of a life-tenant in respect of incumbrances may be increased by any provision in the settlement, the intention must be clearly expressed.

Trust to raise by mortgage.

Thus, a direction to raise a charge by mortgage, does not alter the rights of the parties; the life-tenant being only bound to keep down interest: *Wastell* v. *Leslie*, 13 L. J. Ch. 205.

Trust to raise out of rents.

So a trust to raise debts out of rents and profits, does not throw the burden upon income: *Fitzherbert* v. *Weld*, 24 W. R. 43; *Metcalfe* v. *Hutchinson*, 1 Ch. D. 591; nor does a trust to raise debts out of the rents and profits by leasing, mortgage or sale; *Revel* v. *Watkinson*, 1 Ves. Sen. 93.

But a trust to raise portions out of rents and profits by leasing, has been held to charge income only, and not capital: *Ivy* v. *Gilbert*, 2 P. Wms. 13; 6 Bro. P. C. 68.

And where a trust to raise debts out of the rents, was followed by a gift of the residue of the rents to the life-tenant subject thereto, the debts were held to be a charge on income and not on capital: *Heneage* v. *Andover*, 3 Y. & J. 360; and see *Wilson* v. *Halliley*, 1 Russ. & M. 590 (where there was a limited power of mortgaging), and *Bennett* v. *Wyndham*, 23 Beav. 521 (where there was a prohibition against sale).

So, a direction to raise legacies out of the annual rents and profits, has been held to charge them on income alone: *Marsh* v. *Marsh*, 2 Jur. N. S. 348; and see *Re Green*, 40 Ch. D. 610 (where a direction to pay debts out of the rents, dividends, and annual proceeds, was held to have the same effect).

Direction for life-tenant to pay.

A declaration that the life-tenant shall be bound to pay an incumbrance, charges the income with principal as well as interest: see *Waddell* v. *Waddell*, 6 Dow. 279.

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So does a direction that mortgages shall remain charged until discharged by the life-tenant: *Milnes* v. *Slater*, 8 Ves. 295.

But where the annual rents are directed to be applied by the trustees in paying debts until all are discharged, the life-tenant's rights are only suspended until the debts are paid: *Tewart* v. *Lawson*, 18 Eq. 490; *Norton* v. *Johnstone*, 30 Ch. D. 649; see *ante*, p. 11.

So, if a testator's debts are paid out of capital, notwithstanding a direction for payment out of income, the life-tenant is not liable to recoup the capital out of the income: *Re Green*, 40 Ch. D. 610.

Trustees' discretion.

Where trustees are given a discretion as to the mode of raising a charge, the exercise of their discretion does not in general determine the manner in which the charge is to be borne as between the life-tenant and remainderman: *Marker* v. *Kekewich*, 8 Ha. 291; see *Bennett* v. *Wyndham*, 23 Beav. 521; and it seems to be their duty to charge the principal on the inheritance, and to secure the application of the annual profits in keeping down the interest: see *Kekewich* v. *Marker*, 3 Mac. & G. at p. 328.

S. L. Act, 1882, s. 21.

The power given to trustees by section 21 (ii.) of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), to apply capital money arising under the Act, in discharge, purchase or redemption of incumbrances affecting the settled estate, does not in general interfere with the rights of the life-tenant and remainderman; the former merely losing the interest of the capital money so applied, instead of paying the interest on the incumbrance: see *Re Frewen*, 38 Ch. D. 383; *Re Esdaile*, 54 L. T. 637; and see *Re Richardson*, (1900) 2 Ch. 778.

Tenant right.

Compensation payable to an outgoing tenant of settled land under a farming lease, has to be borne by the life-tenant but it seems that he may recoup himself by

releting the property and making the incoming tenant pay: *Mansel* v. *Norton*, 22 Ch. D. 769; see, however, *Re Rosher*, (1899) W. N. 134.

Agricultural Holdings Acts.

A life-tenant who pays compensation to an outgoing tenant for improvements under the Agricultural Holdings (England) Acts, 1883 to 1900, or expends money under the Acts in executing a drainage improvement, is entitled to obtain from the Board of Agriculture (substituted for the County Court by 63 & 64 Vict. c. 50, s. 3) a charge on the holding repayable by instalments: 46 & 47 Vict. c. 61, ss. 29, 30; 63 & 64 Vict. c. 50, ss. 1, 3; see *Gough* v. *Gough*, (1891) 2 Q. B. 665; and a charge created under the Acts in respect of any improvement mentioned in the first or second part of the First Schedule to the Act of 1900 (see *ante*, p. 58), may be discharged out of capital money arising under the Settled Land Act, 1882: 46 & 47 Vict. c. 61, s. 29; 63 & 64 Vict. c. 50, ss. 1, 3.

Terminable rentcharges under Improvement Acts.

By the Land Drainage Act, 1845, the Public Money Drainage Act, 1846, and the Improvement of Land Act, 1864, a life-tenant is made liable to pay the instalments, which become payable during the continuance of his interest, of terminable rentcharges created in respect of improvements under those Acts: 8 & 9 Vict. c 56, s. 10; 9 & 10 Vict. c. 101, s. 38; 27 & 28 Vict. c. 114, s. 66; and this liability was not affected by the Settled Land Act, 1882: *Re Knatchbull*, 29 Ch. D. 588.

S. L. Act, 1887.

But now, where a rentcharge, whether temporary or perpetual, has been created in pursuance of any Act of Parliament, with the object of paying off moneys advanced for defraying the expenses of an improvement of a kind authorized by the Settled Land Act, 1882, any capital money expended in redeeming such rentcharge, or otherwise providing for its payment, is to be deemed to be applied in payment for an improvement authorized by the Act of 1882: 50 & 51 Vict. c. 30, s. 1.

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Accordingly, trustees may apply capital money in redeeming such a terminable rentcharge, and paying (if necessary) a reasonable and proper bonus as compensation for the lender's loss of interest: *Re Egmont*, 45 Ch. D. 395 (in effect overruling *Re Sudeley*, 37 Ch. D. 123, so far as that case decided that the part of the instalments representing interest could not be paid out of capital).

The Act of 1887 applies although the improvement was made before it came into operation (s. 1); and although the improved land may have been sold and the rentcharge shifted on to other parts of the settled estate: *Re Howard*, (1892) 2 Ch. 233.

But the Act does not entitle the life-tenant to be recouped instalments paid by him before the 23rd August, 1887, when it came into operation (*Re Howard*, (1892) 2 Ch. 233), or before requiring provision to be made for them under the Act: *Re Dalison*, (1892) 3 Ch. 522; *Re Bristol*, (1893) 3 Ch. 161; *Re Verney*, (1898) 1 Ch. 508.

S. L. Act, 1890.

Where money required for discharging an incumbrance is raised by the life-tenant by mortgage of the settled land under the powers of the Settled Land Act, 1890 (53 & 54 Vict. c. 69, s. 11), it is conceived that he is liable to keep down the interest on the mortgage.

Payment of charge by life-tenant.

If the life-tenant pays off a charge on the settled estate, he is presumed to have done so for his own benefit, and is entitled to be recouped the amount out of the estate: *Shrewsbury* v. *Shrewsbury*, 1 Ves. Jun. 227; *Burrell* v. *Egremont*, 7 Beav. 205; *Pitt* v. *Pitt*, 22 Beav. 294; see *Morley* v. *Morley*, 5 D. M. & G. 610.

And the same presumption applies when a charge is paid off by the trustees of the settlement out of the rents: *Re Harvey*, (1896) 1 Ch. 137.

The presumption may be rebutted by evidence of a contrary intention: see *Jones* v. *Morgan*, 1 Bro. C. C. at p. 218; but the burden of proving such intention lies on the remainderman: the mere fact of the charge being released without an intention to keep it alive being expressed, is not sufficient: *Burrell* v. *Egremont*, 7 Beav. 205; *Gifford* v. *Fitzhardinge*, (1899) 2 Ch. 32; see *Cuddon* v. *Cuddon*, 4 Ch. D. 583.

The presumption is not rebutted by the mere fact of the life-tenant being the settlor (*Jameson* v. *Stein*, 21 Beav. 5), or the mother of the remainderman: *Re Harvey*, (1896) 1 Ch. 137; although the fact of the life-tenant being the parent of the remainderman would be of importance if there were anything else to rebut the presumption; see *Re Harvey*, (1896) 1 Ch. at p. 140.

Calls on shares.

Calls on settled shares are payable out of capital, unless a contrary intention is shown by the settlement: *Re Box*, 1 H. & M. 552; *Todd* v. *Moorhouse*, 19 Eq. 69; *Bevan* v. *Waterhouse*, 3 Ch. D. 752; and if paid by the life-tenant, he is entitled to a lien on the shares for the amount: *Rowley* v. *Unwin*, 2 K. & J. 138; *Todd* v. *Moorhouse*, 19 Eq. 69.

As to the rights of a remainderman who pays a call to prevent forfeiture, see *Parke* v. *Thackray*, 24 W. R. 21.

As to the liability of the settlor's estate for calls on shares settled by his will, see *Re Box*, 1 H. & M. at p. 555 (disapproving *Jacques* v. *Chambers*, 4 Railw. Cas. 499, and *Clive* v. *Clive*, Kay, 600).

Premiums on policies.

Where a policy of life assurance is settled, the premiums are payable out of capital, and if there is no fund available, must be raised by mortgage of the policy: *Macdonald* v. *Irvine*, 8 Ch. D. 101; and if the trustees pay the premiums out of income, the life-tenant is

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entitled to be recouped the amount with interest at 4 per cent.: *Re Morley*, (1895) 2 Ch. 738.

But a life-tenant has no lien for premiums voluntarily paid by him for the benefit of the estate, without any expectation of repayment: *Re Waugh*, 46 L. J. Ch. 629; *Browne* v. *Browne*, 2 Gif. 304.

CHAPTER IX.

LOSSES.

Losses: three kinds.

In considering the incidence of losses as between life-tenant and remainderman, it is necessary to ascertain whether the loss is one of income alone, or of capital alone, or of capital and income combined.

Loss of income.

If income alone is lost, the whole loss falls on the life-tenant, unless it has been incurred for the benefit of the estate, or under an order of the Court: see *Shore* v. *Shore*, 4 Dr. at pp. 509, 510.

Unproductive land.

Thus, where unproductive building land is settled, the life-tenant is not entitled to any contribution from capital to make up for the loss of income; although it would seem to be otherwise if the settlement were by way of trust for sale and the sale were delayed: *Yates* v. *Yates*, 28 Beav. 637.

Trustee's defalcations.

So, where a trustee applied the rents of a settled estate to his own use, instead of paying renewal fines pursuant to the trust, the life-tenant had to bear the loss: *Solley* v. *Wood*, 29 Beav. 482.

Reduced annuities.

So, where a fund was settled with a provision that if the investments should be paid off or reduced, the persons interested should bear the loss rateably out of their respective interests on becoming entitled thereto, and the fund was invested in 4 per cent. annuities which were afterwards converted into 3½ per cent. annuities, the life-tenant was held entitled only to the reduced income: *Bague* v. *Dumergue*, 10 Ha. 462.

Mistake of Court.

But where settled residue, paid away under an erroneous

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order of the Court, was subsequently recovered without interest, it was held that the fund recovered must not be treated as capital only, but that such a proportion of the fund as was equivalent to interest at 3 per cent. on the balance ought to be paid to the life-tenant as income: *Re Cleveland*, (1895) 2 Ch. 542.

Business losses.

Losses incurred in carrying on a business must in general be made good out of subsequent profits, and not out of capital, even where the business is carried on by a receiver under an order of the Court: *Upton* v. *Brown*, 26 Ch. D. 588.

But where the Court sanctioned a business being carried on by trustees at a loss because it could not be profitably sold, each year's loss was ordered to be apportioned between capital and income on the footing of such loss representing the accumulation of a sum at compound interest at 4 per cent. from the time when the business ought to have been sold: the amount representing such interest being charged against income and the residue of the loss against capital: *Re Hengler*, (1893) 1 Ch. 586.

And where settled residue comprised a business which the trustees were empowered to carry on, and the will provided that the net profits should be treated as income, and that losses should be defrayed out of the estate, it was held that losses must be borne by capital: *Re Millichamp*, 52 L. T. 758.

Partnership losses.

Where a share in a partnership is settled, the liability of the life-tenant and remainderman is regulated by the practice of the Firm in the absence of any contrary provision in the settlement; and where the practice has been to write off losses against capital, losses are chargeable against capital as between the life-tenant and remainderman: *Gow* v. *Forster*, 26 Ch. D. 672.

Loss of capital.

If part of the capital of an authorized investment is lost without the income having previously fallen into

arrear, the life-tenant simply loses for the future the income of the lost capital, and is not liable to refund any of the past income received by him: see *Shore* v. *Shore*, 4 Dr. at p. 510; and see *Verner* v. *Gen. Com. Invest. Trust*, (1894) 2 Ch. at pp. 258, 270; even where the investment was a hazardous one which produced more than 4 per cent.: *Learoyd* v. *Whiteley*, 12 App. Cas. 727.

Improper investment.

But where an unauthorized investment is made at the instance of the life-tenant to increase his income, and the security proves insufficient, he is liable to recoup capital the amount of income received by him: *Raby* v. *Ridehalgh*, 7 D. M. & G. 104.

Loss of capital and income.

If in addition to the loss of part of the capital, the income of the fund has fallen into arrear, the life-tenant is entitled to an apportionment of the capital in respect of the arrears of income.

Covenant to pay.

Thus, where only part of a fund covenanted to be settled at death was recovered, without interest, several years afterwards, such part of the sum recovered as would with 4 per cent. interest from the death have amounted to the sum recovered, was treated as capital, and the balance as interest belonging to the life-tenant: *Cox* v. *Cox*, 8 Eq. 343.

Bond debt.

So, where settled residue included a bond debt, only part of which could be recovered, and that not until some years after the testator's death, the life-tenant was allowed so much of the sum received as was equal to interest at 4 per cent. from the death on the value of such sum at the end of a year from the death: *Turner* v. *Newport*, 2 Ph. 14.

Legacy.

And where a settled legacy was given with interest at 4 per cent. from the death, and several years elapsed before the estate (which was insufficient) could be realized, it was held that all sums becoming available were divisible rateably between capital and income, so as to give the life-tenant 4 per cent. interest from the death on each amount

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invested on account of capital: *Re Tinkler*, 20 Eq. 456; *Re Dufferin*, W .N. 1867, 75; *Re Barker*, (1897) W. N. 154.

Fund set apart.

So where a settled fund set apart out of residue is lost, and further assets only become available after the life-tenant's death, they are apportionable rateably between the arrears of income due to the life-tenant and the capital due to the remainderman: *Innes* v. *Mitchell*, 1 Ph. 710; 2 Ph. 346.

Mortgage.

So, where the interest on a mortgage falls into arrear, and the security realizes less than the principal, the proceeds are apportionable so as to give the life-tenant the same proportion of the arrears of interest as the proportion of capital received by the remainderman: *Re Moore*, 54 L. J. Ch. 432; and rents and profits of a mortgaged estate paid into court by the receiver in a foreclosure action are apportionable in the same way: *Re Godden*, (1893) 1 Ch. 292.

Account of income.

Where, however, the life-tenant has received some payments on account of income, the rule seems to be to allow apportionment only upon the terms of his bringing into account the income which he has received.

Thus, where a trustee misappropriated the trust fund, but made occasional payments to the life-tenant in respect of income, almost equalling the amount recovered from the trustee's estate, the amount recovered was held to be capital, of which only the income was payable to the life-tenant: *Re Grabowski*, 6 Eq. 12.

And where trustees of a settled fund invested on real security had taken possession under the mortgage, and paid the rents to the life-tenant till her death and then sold, her executors were required to give credit for the rents which she had received, as a condition of being allowed an apportionment of the proceeds: *Re Foster*, 45 Ch. D. 629; see, however, *Lyon* v. *Mitchell*, (1899) W. N. 27.

Special provisions.

The common provision that property not actually producing income shall not be treated as producing income, has been held not to defeat the life-tenant's right to apportionment in respect of arrears of interest on a mortgage, where the security on realization produced less than the capital secured: *Re Hubbuck*, (1896) 1 Ch. 754.

CHAPTER X.

RESIDUARY PERSONALTY.

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Rule in *Allhusen* v. *Whittell.*

ACCORDING to the rule laid down in *Allhusen* v. *Whittell,* 4 Eq. 295, the life-tenant of residuary personal estate is not entitled to any income arising from so much of the estate as is required for payment of debts, funeral and testamentary expenses and immediate legacies, as that never becomes part of the residue: the rule being that such debts, expenses and legacies are to be provided rateably out of the capital and income of the personal estate: such part of the capital being applied for the purpose as with the income of that part for the first year after the death, is sufficient to raise the amount required: *Allhusen* v. *Whittell,* 4 Eq. 295.

The rule is founded on the decisions in *Amphlett* v. *Parke,* 1 Sim. 275, and *Holgate* v. *Jennings,* 24 Beav. 623, and has been held to apply although all the debts, expenses and legacies were actually paid within the year, and the year's income greatly exceeded 5 per cent. on the capital: *Lambert* v. *Lambert,* 16 Eq. 320.

Departure from rule.

The above rule is, however, inconsistent with the principle enunciated in *Caldecott* v. *Caldecott,* 1 Y. & C. C. C. 312, that the life-tenant is only liable for the interest upon the debts and legacies; see *Barnes* v. *Bond,* 32 Beav. 653; and as there is often considerable difficulty in applying the rule in practice, it is not always followed.

Thus, a sum paid by executors, several years after their testator's death, by way of compromise of liability

for breach of trust, has been treated as made up of a debt owing at the death, and subsequent interest thereon at 4 per cent.: the part representing principal being charged against capital, and the part representing interest against income: *Maclaren* v. *Stainton*, 11 Eq. 382.

Annuities. Annuities given by the will are payable out of the income of residue: *Re Grant*, 52 L. J. Ch. 552; see *Scholefield* v. *Redfern*, 2 Dr. & Sm. 173.

Annuity fund. A fund directed to be set apart to answer ordinary life annuities, is residue so far as not required; so that the life-tenant of residue is entitled to surplus income set free by the death of an annuitant: *Gibbs* v. *Gibbs*, 26 L. T. 865.

Portion fund. So where a fund is directed to be appropriated to answer portions, the life-tenant of residue is entitled to the income of the balance of the fund remaining after the portions are satisfied: *Re Phillips*, 49 L. J. Ch. 198.

Contingent legacy fund. Any fund merely required to answer contingent liabilities is in the meantime treated as residue.

Hence the life-tenant of residue is entitled to the intermediate income of a fund set apart to answer reversionary life annuities (*Cranley* v. *Dixon*, 23 Beav. 512), or conditional annuities (*Re Whitehead*, (1894) 1 Ch. 678; *contrà*, *Tucker* v. *Boswell*, 5 Beav. 607), or contingent legacies: *Allhusen* v. *Whittell*, 4 Eq. 295; *Crawley* v. *Crawley*, 7 Sim. 427; *Morgan* v. *Morgan*, 4 De G. & S. 164; and it makes no difference that the fund is directed to form part of residue on failure of the contingency: *Fullerton* v. *Martin*, 1 Dr. & Sm. 31; *Edmunds* v. *Waugh*, 2 N. R. 408.

But where the capital was insufficient to satisfy the contingent liability, and the life-tenant could not give security for refunding, the income was ordered to be accumulated until the contingency happened or failed: *Fletcher* v. *Stevenson*, 13 L. J. Ch. 202.

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Accumulations of income.

Where a contingent legacy, given with accumulations of income fails, the life-tenant of residue is entitled to the accumulations made in his lifetime within legal limits: *Morgan* v. *Morgan*, 4 De G. & S. 164.

Where the interest of a legacy is directed to be accumulated beyond the period allowed by law, the interest accruing after that period on both legacy and accumulations forms part of the capital of residue: *Crawley* v. *Crawley*, 7 Sim. 427; *O'Neill* v. *Lucas*, 2 Keen, 313; *Morgan* v. *Morgan*, 4 De G. & S. 164; *Re Pope*, (1900) W. N. 244 (not following *Re Phillips*, 49 L. J. Ch. 198).

Income of residue.

The life-tenant of residuary personal estate is not, as a matter of course, entitled to the whole income actually produced thereby: the question whether he is so entitled or not, in the absence of express provision, depends on the way in which the residue is invested.

Authorized investments.

In the case of authorized investments existing at the testator's death, the life-tenant takes the income actually produced from the death, nothwithstanding a trust for conversion: *Hewitt* v. *Morris*, T. & R. 241; *La Terriere* v. *Bulmer*, 2 Sim. 18; *Allhusen* v. *Whittell*, 4 Eq. 295; securities in which investment is authorized by the will, standing on the same footing as securities authorized by law for the investment of trust funds: *Brown* v. *Gellatly*, 2 Ch. 751.

The rule is the same where residuary personalty is directed to be invested in land and settled: the life-tenant being entitled to the income of such part as consists of authorized trust securities as from the testator's death, in the absence of any direction to the contrary: *Angerstein* v. *Martin*, T. & R. 232; *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 312; *Macpherson* v. *Macpherson*, 1 Macq. 243. And where the intermediate income is directed to be accumulated until investment, the Court stops the accumulation at the end

of a year from the death: *Sitwell* v. *Bernard*, 6 Ves. 520; *Kilvington* v. *Gray*, 2 Sim. & St. 396; *Tucker* v. *Boswell*, 5 Beav. 607; see *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 312; and see *Entwistle* v. *Markland*, 6 Ves. 528 n.; *Stuart* v. *Bruere*, 6 Ves. 529 n.

Where existing investments become authorized by statute after the death, the life-tenant is entitled to the whole income from the time when they became authorized: *Hume* v. *Richardson*, 4 D. F. & J. 29.

In the case of authorized investments made after the death, the life-tenant takes the income from the date of investment: *La Terriere* v. *Bulmer*, 2 Sim. 18.

Unauthorized investments.

The life-tenant of residue is not in general entitled to the income produced by unauthorized investments; the rule being that such investments must be converted into consols or other authorized securities of a permanent nature for the benefit of all parties interested: *Howe* v. *Dartmouth*, 7 Ves. 137; see *Baud* v. *Fardell*, 7 D. M. & G. 628.

Rule in *Howe* v. *Ld. Dartmouth*.

This rule (commonly called 'the Rule in *Howe* v. *Lord Dartmouth*') does not proceed on any presumed intention of the testator that the property should be converted, but is based on the presumption that he intended it to be enjoyed in succession; an intention which can only be carried out by means of conversion and investment in permanent securities: see *Hinves* v. *Hinves*, 3 Ha. at p. 611; *Cafe* v. *Bent*, 5 Ha. at p. 35; *Pickup* v. *Atkinson*, 4 Ha. at p. 628; *Morgan* v. *Morgan*, 14 Beav. at p. 82.

Wasting property.

The rule applies with special force to property of a wasting or perishable nature, such as:—

(1) Terminable annuities: *Howe* v. *Dartmouth*, 7 Ves. 137; *Sutherland* v. *Cooke*, 1 Coll. 498; *Lichfield* v. *Baker*, 13 Beav. 447; *Preston* v. *Melville*, 15 Sim. 35; *James* v. *Gammon*, 15 L. J. Ch. 217; *Morgan* v. *Morgan*, 14 Beav. 72; *Hood* v. *Clapham*, 19 Beav. 90; *Pidgeon* v. *Spencer*, 16 L. T. 83.

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(2) Leaseholds: *Benn* v. *Dixon*, 10 Sim. 636; *Sutherland* v. *Cooke*, 1 Coll. 498; *Johnson* v. *Johnson*, 2 Coll. 441; *Pickup* v. *Atkinson*, 4 Ha. 624; *Chambers* v. *Chambers*, 15 Sim. 183; *Morgan* v. *Morgan*, 14 Beav. 72; *Craig* v. *Wheeler*, 29 L. J. Ch. 374; *Re Llewellyn*, 29 Beav. 171; *Green* v. *Britten*, 42 L. J. Ch. 187; *Re Smith*, 48 L. J. Ch. 205; *Re Game*, (1897) 1 Ch. 881.

(3) Consumables and furniture: *Smith* v. *Pugh*, 6 Jur. 701; *Hood* v. *Clapham*, 19 Beav. 90; see *Randall* v. *Russell*, 3 Mer. at p. 195.

Unauthorized investments.

But the rule also applies to all other property not authorized by law for the investment of trust funds, unless expressly authorized by the will, such as:—

(1) Bond debts: *Johnson* v. *Johnson*, 2 Coll. 441.

(2) Dutch bonds: *Blann* v. *Bell*, 2 D. M. & G. 775.

(3) Egyptian bonds: *Macdonald* v. *Irvine*, 8 Ch. D. 101.

(4) A business (*Offen* v. *Reeve*, 24 L. T. O. S. 172; *Kirkman* v. *Booth*, 11 Beav. 273; *Re Chancellor*, 26 Ch. D. 42), or share in a partnership: *Fearns* v. *Young*, 9 Ves. 549; *Taylor* v. *Clark*, 1 Ha. 161; *Meyer* v. *Simonsen*, 5 De G. & S. 723.

(5) Canal shares: *Blann* v. *Bell*, 2 D. M. & G. 775; unless within the Trustee Act, 1893, 56 & 57 Vict. c. 53, s. 1 (re-enacting 52 & 53 Vict. c. 32, s. 3).

(6) Gas stock: *Re Eaton*, 70 L. T. 761.

(7) Railway shares: *Thornton* v. *Ellis*, 15 Beav. 193; unless within the Trustee Act, 1893, 56 & 57 Vict. c. 53, s. 1 (re-enacting 52 & 53 Vict. c. 32, s. 3).

(8) Waterworks shares: *Furley* v. *Hyder*, 42 L. J. Ch. 626.

(9) Shares in insurance and other companies: *Blann* v. *Bell*, 2 D. M. & G. 775; *Johnson* v. *Johnson*, 2 Coll. 441.

(10) Reversionary and deferred interests in personal estate: see *post*, p. 110.

Bank stock and East India stock were within the rule until made authorized investments: see *Howe* v. *Dartmouth*, 7 Ves. 137; *Jebb* v. *Tugwell*, 20 Beav. 84; but see now 56 & 57 Vict. c. 53, s. 1 (re-enacting 52 & 53 Vict. c. 32, s. 3, which replaced 22 & 23 Vict. c. 35, s. 32).

Bank stock and East India stock.

Real securities, although at one time unauthorized investments, have never been within the rule; the practice being not to order their conversion without an inquiry whether it would be for the benefit of all parties: see *Howe* v. *Dartmouth*, 7 Ves. 137: and see now 56 & 57 Vict. c. 53, s. 1 (re-enacting 52 & 53 Vict. c. 32, s. 3, which replaced 22 & 23 Vict. c. 35, s. 32).

Real securities.

If unauthorized investments existing at the testator's death are improperly retained, the life-tenant is entitled, as from the death, to an income equal to the dividends of the consols which would have been produced by conversion and investment in consols at the end of a year from the death: *Dimes* v. *Scott*, 4 Russ. 195; *Taylor* v. *Clark*, 1 Ha. 161; *Morgan* v. *Morgan*, 14 Beav. 72; *Brown* v. *Gellatly*, 2 Ch. 751 (not following *Robinson* v. *Robinson*, 1 D. M. & G. 247, where 4 per cent. on the value was allowed); although in some cases the value has been taken as at the death: see *Hume* v. *Richardson*, 4 D. F. & J. 29; *Allhusen* v. *Whittell*, 4 Eq. 295; *Furley* v. *Hyder*, 42 L. J. Ch. 626; and see *Re Smith*, 48 L. J. Ch. 205.

Income of unauthorized investments.

The cases of *Stott* v. *Hollingworth*, 3 Madd. 161, and *Taylor* v. *Hibbert*, 1 J. & W. 308 (where the life-tenant was allowed no income during the first year), *La Terriere* v. *Bulmer*, 2 Sim. 18 (where income from the time of conversion only was allowed), and *Douglas* v. *Congreve*, 1 Keen, 410 (where the income actually produced during the first year was allowed), are overruled in this respect by *Macpherson* v. *Macpherson*, 1 Macq. 243, and the cases above mentioned.

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Consols rule.

Consols have been taken as the standard because they are regarded as absolutely safe; and the rule is therefore still the same notwithstanding the reduced rate of interest of the new consols, and the increased range of authorized securities: *Re Duckworth*, 35 S. J. 561.

Where 4 per cent. allowed.

Where, however, unauthorized investments producing more than 4 per cent. interest are retained for the benefit of the estate, either in the absence of a trust for conversion or under a power to continue existing investments, the practice is to allow the life-tenant interest on the value, as from the death, at the rate of 4 per cent.: the balance of the interest produced being treated as capital: *Meyer* v. *Simonsen*, 5 De G. & S. 723; see *Re Chancellor*, 26 Ch. D. at p. 46; *Wentworth* v. *Wentworth*, (1900) A. C. at p. 171.

Thus, where a share in a partnership, carrying interest at 5 per cent., was retained because it could not be realized at once except at a loss, the life-tenant was allowed 4 per cent. interest on the capital, besides the income produced by the investment of the surplus interest: *Meyer* v. *Simonsen*, 5 De G. & S. 723; *Re Llewellyn*, 29 Beav. 171.

So, in the case of stocks and shares producing a high rate of interest: *Furley* v. *Hyder*, 42 L. J. Ch. 626; *Re Eaton*, 70 L. T. 761; see *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 312, 737.

And so in the case of ships earning large profits: *Brown* v. *Gellatly*, 2 Ch. 751; *Cooper* v. *Laroche*, 38 L. J. Ch. 591.

And in one case, where a very profitable business was continued under an order of the Court at the request of all parties *sui juris*, the life-tenants were allowed interest at 5 per cent. on the capital employed: *Lambert* v. *Rendle*, 3 N. R. 247.

It is submitted that a life-tenant is still entitled to 4 per cent. interest in cases like the above, as the reduction

in the rate of interest generally ought not to affect the rights of the parties as to past income where the property has actually produced more than 4 per cent.; but see *Re Nicholson*, (1895) W. N. 106; *Re Lynch Blosse*, (1899) W. N. 27.

Wasting property.

Wasting property retained for the benefit of the estate has been treated in the same way as unauthorized investments similarly retained.

Thus, a life-tenant has been allowed 4 per cent. interest on the value of leaseholds retained on account of a defect in title which rendered them unsaleable, notwithstanding a trust for conversion: *Gibson* v. *Bott*, 7 Ves. 89; see *Mehrtens* v. *Andrews*, 3 Beav. 72; *Green* v. *Britten*, 42 L. J. Ch. 187.

But in the case of a terminable annuity, retained because the trustees were unable to sell, the instalments were ordered to be invested and the life-tenant was allowed the interest of the investments: *Crawley* v. *Crawley*, 7 Sim. 427; and where the residue comprised the intermediate income of a fund, set apart under another person's will to answer future legacies, it was treated in the same way: *Re Whitehead*, (1894) 1 Ch. 678.

The Court has a discretion to allow the life-tenant 4 per cent. interest on the value of wasting property retained by an innocent mistake, where there is no trust for conversion: *Sutherland* v. *Cooke*, 1 Coll. 503.

Refunding overpayments.

If the life-tenant receives the whole income of unauthorized investments, he is liable to refund the excess over the income to which he is entitled: *Hood* v. *Clapham*, 19 Beav. 90; see *Lichfield* v. *Baker*, 13 Beav. 447; *Robinson* v. *Robinson*, 1 D. M. & G. at p. 264; and if he receives the whole income of leaseholds or terminable annuities until they expire, he is liable to recoup the amount which would have been produced by their conversion: *Tickner* v. *Old*, 18 Eq. 422.

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But the life-tenant was held not liable to refund where the wasting property was retained against her wish: *Bate* v. *Hooper*, 5 D. M. & G. 338; and if the remainderman, being also the executor, allows the life-tenant to receive the whole income for a long period, it may be doubted whether he could afterwards call on him to refund: see *Pickering* v. *Pickering*, 4 My. & Cr. 289.

A distinction has been drawn in the case of unauthorized investments made by trustees in breach of trust: see *Stroud* v. *Gwyer*, 28 Beav. 130 (where the life-tenant was held entitled to the whole income produced thereby); but this case has been disapproved: see *Re Hill*, 50 L. J. Ch. 551.

Exclusion of rule in *Howe* v. *Ld. Dartmouth*.

The rule in *Howe* v. *Lord Dartmouth*, may be excluded if the will discloses an intention, either by express declaration or by necessary implication, that the property shall be enjoyed in its existing state: *Pickering* v. *Pickering*, 4 My. & Cr. 289; *Hinves* v. *Hinves*, 3 Ha. 609; the question in every case being one of construction: see *Lichfield* v. *Baker*, 2 Beav. at p. 487; *Morgan* v. *Morgan*, 14 Beav. at p. 82; *Daniel* v. *Warren*, 2 Y. & C. C. C. at p. 293.

But the onus of pointing out the words in the will which exclude the rule, lies on those who contend that the rule is excluded: *Sutherland* v. *Cooke*, 1 Coll. 498; *James* v. *Gammon*, 15 L. J. Ch. 217; *Morgan* v. *Morgan*, 14 Beav. 72; *Blann* v. *Bell*, 2 D. M. & G. 775; *Macdonald* v. *Irvine*, 8 Ch. D. 101; *Re Game*, (1897) 1 Ch. 881.

Tendency of cases.

The tendency of the cases has been to allow small indications of intention to exclude the rule: the provisions most frequently relied on being directions for the enjoyment or management of the property which would be defeated by conversion at the testator's death: see *Hinves* v. *Hinves*, 3 Ha. 609; *Cotton* v. *Cotton*, 14 Jur.

950; *Morgan* v. *Morgan*, 14 Beav. at pp. 82, 83; and some of the cases have probably gone too far in this direction: see *Blann* v. *Bell*, 2 D. M. & G. at p. 779; *Craig* v. *Wheeler*, 29 L. J. Ch. at p. 376.

Partial exclusion of rule.

But the fact of an intention being shown against the conversion of one kind of property, does not necessarily exclude the rule in the case of other property; *Blann* v. *Bell*, 2 D. M. & G. 775; *Hood* v. *Clapham*, 19 Beav. 90.

Trust for conversion.

Where there is an unqualified trust for conversion at the testator's death, the rule, of course, applies: see *Thursby* v. *Thursby*, 19 Eq. at p. 408.

A direction to convert specified parts of the residue does not entitle the life-tenant to the enjoyment of the remainder in specie: *Hood* v. *Clapham*, 19 Beav. 90.

But a direction to sell such part of the residue as the trustees should think necessary, and to pay off charges on the testator's leaseholds, and to pay the annual produce to one for life, was held to entitle the life-tenant to enjoy in specie such leaseholds as the trustees did not sell: *Re Sewell*, 11 Eq. 80.

So a direction to convert the residue, except investments in the public funds or stocks or government securities, has been held to entitle the life-tenant to enjoy long annuities in specie: *Howard* v. *Kay*, 6 W. R. 361; *Grant* v. *Mussett*, 8 W. R. 330; *Wilday* v. *Sandys*, 7 Eq. 455; but see *Reynolds* v. *Brown*, 1 W. R. 50 (where a similar exception was held to refer to such stocks only as were proper investments); and see *post*, p. 109.

Trust for conversion at life-tenant's death.

A trust to convert the residue at the death of the life-tenant, impliedly negatives earlier conversion, and therefore entitles the life-tenant to enjoy it in specie, even in the case of terminable annuities: *Alcock* v. *Sloper*, 2 M. & K. 699; or leaseholds: *Daniel* v. *Warren*, 2 Y. & C. C. C. 290; *Hunt* v. *Scott*, 1 De G. & S. 219; or farming stock: *Rowe* v. *Rowe*, 29 Beav. 276; or

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partnership profits: *Greaves* v. *Smith*, 22 W. R. 388; but cash must be invested to preserve it for the remainderman: *Re Holden*, 57 L. J. Ch. 648.

The effect of a direction to convert at the life-tenant's death is not neutralized by a discretionary power of sale during his life, so long as such power is not exercised: *Greaves* v. *Smith*, 22 W. R. 388; see *Re Courtier*, 34 Ch. D. 136.

The decision in *Mills* v. *Mills*, 7 Sim. 501, seems not reconcilable with the other authorities.

Discretion as to time of sale.

A discretion given to the trustees as to the time of sale, under a trust for conversion, without any direction as to interim income, does not entitle the life-tenant to the specific enjoyment of wasting property or unauthorized securities, such as leaseholds (*Re Carter*, 41 W. R. 140), or waterworks shares: *Furley* v. *Hyder*, 42 L. J. Ch. 626.

But an express direction that the income of all unconverted property shall be paid to the life-tenant, entitles him to the whole income up to conversion, whether the property be of a wasting or permanent nature, in the absence of any improper delay: *Wrey* v. *Smith*, 14 Sim. 202; *Mackie* v. *Mackie*, 5 Ha. 70; *Sparling* v. *Parker*, 9 Beav. 524; see, however, *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 312.

Power to postpone conversion.

A power for the trustees to postpone conversion, coupled with a direction to apply intermediate income in the same manner as the income of the proceeds of conversion, entitles the life-tenant to the actual income until conversion, even in the case of wasting or fluctuating property, such as:—

(1) Leaseholds and foreign stock: *Morley* v. *Mendham*, 2 Jur. N. S. 998.

(2) Mint or mining shares: *Murray* v. *Glasse*, 23 L. J. Ch. 126; *Waters* v. *Waters*, 32 L. T. 306 n.

(3) Ships: *Lean* v. *Lean*, 32 L. T. 305.

(4) A business, whether carried on merely for a short period for the purpose of selling it profitably as a going concern (*Re Chancellor*, 26 Ch. D. 42), or for a long period for the purpose of making profits: *Re Crowther*, (1895) 2 Ch. 56; see *Re Norrington*, 13 Ch. D. 654.

(5) A share in a partnership business: *Johnston* v. *Moore*, 27 L. J. Ch. 453; or

(6) Shares in a limited company: see *Re Armitage*, (1893) 3 Ch. at p. 345.

But in the case of a mortgage-debt, a provision giving the life-tenant the actual income does not entitle him to the rents of the mortgaged property if the trustees take possession, as such property does not become part of the estate unless foreclosed: *Re Godden*, (1893) 1 Ch. 292.

Power to retain.

A power for the trustees to retain existing investments included in a trust for conversion without any direction as to the income thereof, entitles the life-tenant to the income produced by retained investments of a permanent nature: *Bulkeley* v. *Stephens*, 3 N. R. 105; but see *Re Thomas*, (1891) 3 Ch. at p. 486; *Re Lynch Blosse*, (1899) W. N. 27; but not to the income of wasting property: *Taylor* v. *Clark*, 1 Ha. 161; *Re Whitehead*, (1894) 1 Ch. 678; see *Tickner* v. *Old*, 18 Eq. 422.

But if the power to retain is coupled with a direction that the income of the part retained, or of the investments for the time being representing residue, is to be applied in the same way as the income of the part converted, the life-tenant is entitled to the actual income of property retained, although of a wasting or fluctuating nature: *Scholefield* v. *Redfern*, 2 Dr. & Sm. 173, 181; *Solomon* v. *Solomon*, 10 L. T. 54; *Re Thomas*, (1891) 3 Ch. 482.

A power for the trustees to continue the estate in a business with the life-tenant's consent, with a direction to pay her the annual income of the trust funds, was held to entitle her to the profits of the business as

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income: *Lambert* v. *Lambert*, 20 W. R. 943; but see *Cooper* v. *Laroche*, 38 L. J. Ch. 591.

Where no trust for conversion.

The mere absence of a trust for conversion is not sufficient to exclude the rule in *Howe* v. *Lord Dartmouth*: see *Morgan* v. *Morgan*, 14 Beav. 72; *Holgate* v. *Jennings*, 24 Beav. 623.

Direction not to sell.

But an express direction for the trustees not to sell excludes the rule.

Thus, a direction not to sell ships forming part of residue has been held to entitle the life-tenant to the actual income derived therefrom: *Green* v. *Britten*, 1 D. J. & S. 649; see W. N. 1867, 217.

Power to retain.

A power for the trustees to retain existing investments, without any direction as to the income thereof, where there is no trust for conversion, entitles the life-tenant to the income produced by retained investments of a permanent nature: *Re Sheldon*, 39 Ch. D. 50; but not to the income of wasting property, such as terminable annuities (*Porter* v. *Baddeley*, 5 Ch. D. 542), or leaseholds (see *Re Llewellyn*, 29 Beav. 171); see however, *Gray* v. *Siggers*, 15 Ch. D. at p. 77.

Power to carry on business.

A power for the trustees to carry on a colliery business, with powers of leasing and sale, has been held to entitle the life-tenant to enjoy the produce in specie: *Thursby* v. *Thursby*, 19 Eq. 395.

But where the will empowers the trustees to employ the residue in a partnership business, without providing for the application of the profits, the partnership articles (whether entered into by the testator, or by the trustees under a power in his will), regulate what is capital and what is income: *Straker* v. *Wilson*, 6 Ch. 503: *Stroud* v. *Gwyer*, 28 Beav. 130.

Power of sale.

A discretionary power of sale given to the trustees excludes the rule in *Howe* v. *Lord Dartmouth*, where

there is no trust for conversion: *Skirving* v. *Williams*, 24 Beav. 275; *Simpson* v. *Lester*, 4 Jur. N. S. 1269; *Re Leonard*, 29 W. R. 234; *Re Pitcairn*, (1896) 2 Ch. 199; and see *Burton* v. *Mount*, 2 De G. & S. 383; *Bowden* v. *Bowden*, 17 Sim. 65; *Hind* v. *Selby*, 22 Beav. 373; *Lane* v. *Brown*, 25 L. T. 152.

But a power of sale given to the first life-tenant seems not to entitle a subsequent life-tenant to enjoy the property in specie: see *Jebb* v. *Tugwell*, 20 Beav. 84.

Power to vary.

A power to vary securities does not exclude the rule, as it shows that conversion was intended: *Morgan* v. *Morgan*, 14 Beav. 72; *Re Llewellyn*, 29 Beav. 171.

Gift of whole income.

The rule in *Howe* v. *Lord Dartmouth* may also be excluded by a clear gift to the life-tenant of the whole income produced by the residue in its existing state.

Examples:—

(1) A gift of 'the whole income' of testator's 'property of all descriptions' to his wife for life, 'at her own disposal but not to sell without the consent of all parties,' was held to entitle her to the income of leaseholds and terminable annuities in specie: *Hinves* v. *Hinves*, 3 Ha. 609.

(2) A trust to permit testator's wife to receive and take 'the clear rents, issues, and profits,' of his real and personal estate after paying outgoings, with a gift over of all his estate term and interest therein at her death, was held to entitle her to enjoy leaseholds in specie: *Harris* v. *Poyner*, 1 Dr. 174.

(3) A direction to pay testator's wife 'all rents, dividends or funded property, and all other rents or interest' to which he was entitled 'and at her death all the residue of his estate' to be divided, was held to entitle her to enjoy leaseholds in specie: *Marshall* v. *Bremner*, 2 Sm. & G. 237.

(4) A gift of 'the interest, dividends, or income, of all moneys or stock' and of 'all other property whatsoever

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yielding income' at testator's death, to one for life, 'the principal to remain untouched and at her death to be divided,' was held to entitle the life-tenant to the specific enjoyment of East India railway stock and Canadian government debentures and railway bonds: *Boys* v. *Boys*, 28 Beav. 436.

(5) A direction that the persons for the time being entitled to settled estates should receive the yearly dividends of the public or other funds and the yearly interest of other parts of the residue under letters of attorney and powers from the trustees, was held to entitle the life-tenant to enjoy long annuities in specie: *Neville* v. *Fortescue*, 16 Sim. 333.

(6) A gift of all and every part of testator's property 'in every shape and without any reserve and in whatever manner situated,' to his wife for life and at her death the property so left to be divided, was held to entitle her to enjoy leaseholds in specie: *Collins* v. *Collins*, 2 M. & K. 703.

(7) A gift of 'all the interest, rents, dividends, annual produce and profits, use and enjoyment' of all testator's estate and effects whatsoever, to his wife for life, with a gift over at her decease of the residue of his estate and effects, was held to entitle her to enjoy leaseholds and a terminable annuity in specie: *Pickering* v. *Pickering*, 4 My. & Cr. 289; *Simpson* v. *Earles*, 11 Jur. 921; and see *Harvey* v. *Harvey*, 5 Beav. 134; *Burton* v. *Mount*, 2 De G. & Sm. 383; *Howe* v. *Howe*, 14 Jur. 359.

Specific mention.

The mere enumeration of some wasting or insecure property in a residuary gift, is not in general sufficient to exclude the rule in *Howe* v. *Lord Dartmouth*, though there be no trust for conversion: *Sutherland* v. *Cooke*, 1 Coll. 498; *Pickup* v. *Atkinson*, 4 Ha. 624; see *Craig* v. *Wheeler*, 29 L. J. Ch. 374; unless there is a specific reference to the property as existing in the same form

after or during the life-tenancy: see *Hubbard* v. *Young*, 10 Beav. 203; *House* v. *Way*, 18 L. J. Ch. 22; and see *Harris* v. *Poyner*, 1 Dr. 174; *Holgate* v. *Jennings*, 24 Beav. 623.

But the enumeration may be so worded as to exclude the rule.

Examples:—

(1) A gift of the residue of freehold and leasehold estates and all other estates and effects upon trust to pay the rents, profits, and annual produce, to one for life, was held to entitle the life-tenant to enjoy the leaseholds in specie: *Blann* v. *Bell*, 2 D. M. & G. 775; *Crowe* v. *Crisford*, 17 Beav. 507 (where there was a direction to renew leaseholds); *Hood* v. *Clapham*, 19 Beav. 90; *Re Elmore*, 9 W. R. 66; and see *Kirkman* v. *Booth*, 11 Beav. 273.

(2) A gift of residue, expressly including the cottage in which testator resided, to one for life upon trust to allow her sister to live with her in the cottage, rent free, was held to entitle the life-tenant to enjoy the furniture in the cottage in specie: *Cotton* v. *Cotton*, 14 Jur. 950.

(3) A gift of 'the residue of my property, all I do or may possess in the funds, copy or leasehold estates,' was held to entitle the life-tenant to enjoy terminable annuities in specie: *Bethune* v. *Kennedy*, 1 My. & Cr. 114; see *Milne* v. *Parker*, 17 L. J. Ch. 191, but see *Sheppard* v. *Joynes*, 2 W. R. 26.

(4) A gift of 'the whole' of testator's property, specifying a leasehold house and long annuities, 'with the residue and interest should there be any,' to one for life and then over, was held to entitle the life-tenant to enjoy the leasehold house and long annuities in specie: *Vaughan* v. *Buck*, 1 Ph. 75; see *Oakes* v. *Strachey*, 13 Sim. 414.

Mixed residue

The mere fact of real estate being included in the same gift does not exclude the rule: see *Howe* v. *Lord*

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Dartmouth, 7 Ves. 137; *Hinves* v. *Hinves*, 3 Ha. at p. 612: although it may be material in conjunction with other circumstances: see *Howe* v. *Howe*, 14 Jur. at p. 360.

Rents.

And the better opinion seems to be that the mere direction to pay 'rents' to the life-tenant, without any mention of leaseholds, is not a sufficient indication of intention that the life-tenant is to enjoy them in specie, if real estate is comprised in the residuary gift: *Pickup* v. *Atkinson*, 4 Ha. 624; see *Harris* v. *Poyner*, 1 Dr. at p. 179; although accompanied by a charge of annuities with power of distress: *Re Game*, (1897) 1 Ch. 881; but see *Vachell* v. *Roberts*, 32 Beav. 140; *Goodenough* v. *Tremanondo*, 2 Beav. 512 (where the will was not executed so as to pass real estate); *Cafe* v. *Bent*, 5 Ha. 24 (where the trustees were directed to retain a percentage of the rents collected), and *Wearing* v. *Wearing*, 23 Beav. 99.

Reversionary interests.

Reversionary or deferred interests in personal estate, forming part of residue and producing no income, are within the rule in *Howe* v. *Lord Dartmouth*, and must accordingly be converted for the benefit of all parties interested, unless a contrary intention is shown by the will: see *Howe* v. *Dartmouth*, 7 Ves. at p. 148; *Dimes* v. *Scott*, 4 Russ. at p. 200; *Johnson* v. *Routh*, 27 L. J. Ch. 305; *Harrington* v. *Atherton*, 2 D. J. & S. 352.

Old rule.

In the earlier cases, where a reversionary interest had been allowed to remain until it fell into possession, the life-tenant was allowed simple interest at 4 per cent. from the testator's death on the value at the death or at the end of a year from the death, calculated on the assumption that it would fall in when it actually did: see *Fearns* v. *Young*, 9 Ves. 549; *Wilkinson* v. *Duncan*, 23 Beav. 469; *Jackson* v. *Jackson*, 17 W. R. 547; *Gibbs* v. *Gibbs*, 26 L. T. 865; *Wright* v. *Lambert*, 6 Ch. D. 649.

Present rule.

But it is now settled that where a reversionary or deferred interest, whether vested or contingent, is retained for a period after the death, in the absence of any provision as to intermediate income, the amount realized by its conversion must be apportioned between capital and income, so that the part representing capital may bear the same proportion to the part representing income, as a fund accumulating at compound interest for the same period would bear to the accumulated interest; accordingly so much of the amount realized as would at compound interest, from the death until the day of realization, have produced the amount actually realized, is treated as capital and the balance as income: *Beavan* v. *Beavan*, 24 Ch. D. 649 n.; *Re Chesterfield*, 24 Ch. D. 643; *Re Hobson*, 55 L. J. Ch. 422; *Re Morley*, (1895) 2 Ch. 738.

The rate of interest allowed in the above cases was 4 per cent., but in consequence of the reduced rate of interest now obtainable from trust securities, it has recently been laid down that for the future only 3 per cent. is to be allowed: *Re Goodenough*, (1895) 2 Ch. 537; *Rowlls* v. *Bebb*, (1900) 2 Ch. 107.

Outstanding estate.

Outstanding personal estate, such as a debt, recovered with arrears of interest after the testator's death, is apportionable in the same way as a deferred interest: *Beavan* v. *Beavan*, 24 Ch. D. 649 n.; *Re Chesterfield*, 24 Ch. D. 643; see *Re Godden*, (1893) 1 Ch. 292.

Exclusion of rule.

The rule in *Howe* v. *Lord Dartmouth* may be excluded in the case of a reversionary interest, in the same way as in the case of wasting property.

Thus, where there is a trust to convert with a discretion as to time of conversion, the rule is excluded by a direction that the actual income of property remaining unconverted shall be treated in the same way as income after conversion: see *Mackie* v. *Mackie*, 5 Ha. 70.

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But where there was a discretionary power for the trustees to postpone conversion, with a direction that the yearly produce until conversion should be deemed income, and a reversionary interest was left unconverted by an oversight, under circumstances which would have precluded the trustees from exercising the power of postponement, the rule was held not to be excluded: *Rowlls* v. *Bebb*, (1900) 2 Ch. 107.

Where there is no trust for conversion, the rule is excluded by a discretionary power of sale: *Re Pitcairn*, (1896) 2 Ch. 199; see *Lane* v. *Brown*, 25 L. T. 152.

A direction that a reversionary interest should form part of the testator's personal estate and be paid to his executors and trustees accordingly, was held to exclude conversion, so that the life-tenant was not entitled to an apportionment in respect of income before it fell in: *Re Flower*, 63 L. T. 201.

So, where a fund set apart by the will was directed to sink into and form part of residue on the happening of a contingency, the life-tenant was held not entitled to any apportionment on account of intermediate income: *Pigott* v. *Pigott*, (1893) W. N. 115.

Where rule does not apply.

The rule in *Howe* v. *Lord Dartmouth* seems not to apply in the following cases:—

(1) Where the property and all parties interested are out of the jurisdiction: *Holland* v. *Hughes*, 16 Ves. 111.

(2) In the case of terminable and reversionary interests which taken together constitute a permanent income-producing fund.

Thus, where the residue comprised both life annuities and policies on the annuitants' lives, securing the capital value of the annuities, the Court allowed the annuities to be retained and the policies kept up, and gave the life-tenant the surplus of the annuities after payment of the policy premiums: *Glengall* v. *Barnard*, 5 Beav. 245.

Income where rule excluded.

When the rule in *Howe* v. *Lord Dartmouth* is excluded, the income payable to the life-tenant includes the same items as in the case of specifically settled property : see Ch. I.

But a provision entitling the life-tenant to enjoy residue in specie does not preclude the trustees from getting in mere debts, such as turnpike bonds (*Holgate* v. *Jennings*, 24 Beav. 623), or mortgage debts left on insufficient securities : *Crowe* v. *Crisford*, 17 Beav. 507.

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